83-573

NO. 83-498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DONALD THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY; G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

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Dated: September, 1983

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Questions Presented

1. Does the National Labor Relations Act prohibit New Jersey from imposing certain disqualification criteria on officials of casino industry labor unions, where such criteria are an essential part of a broad regulatory scheme designed to foster the vital state interest in protecting the integrity of the casino industry?

2. Should the federal courts abstain from exercising jurisdiction over a suit seeking to enjoin an ongoing state administrative proceeding, where the state proceeding was brought by the New Jersey Attorney General in furtherance of New Jersey's vital interest in maintaining the integrity of its casino industry?[1]

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[1] The following are the parties to the United States Court of Appeals proceeding from which this appeal is taken: Hotel and Restaurant Employees and Bartenders International Union Local 54; Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54; New Jersey Casino Control Commission; Martin Danziger, Acting Chairman; Don Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner; State of New Jersey Department of Law and Public Safety, Division of Gaming Enforcement; G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement; Thomas Kean, Governor, State of New Jersey; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Section 331.

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3 Cir. 1983) and is reproduced in the joint appendix of appellants as Appendix A. The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) and is reproduced as Appendix B. The opinion and supplemental opinion of the New Jersey Casino Control Commission are unreported and are reproduced as Appendices D and F.

Jurisdiction

These proceedings involve a claim that section 93 of the New Jersey Casino Control Act N.J. Stat. Ann. §5:12-93 (West Supp. 1983) is invalid under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI cl. 2, because it is preempted by federal labor legislation. The District Court found that federal jurisdiction was properly invoked under 28 U.S.C. §1331 (West Supp. 1983) and 28 U.S.C. §1337 (West Supp. 1983) (App. B, 90a).

Plaintiffs, a labor union and its president, moved for a preliminary injunction against enforcement of section 93. Defendants, the New Jersey officials charged with implementation of the Casino Control Act, moved to dismiss the complaint on the ground of abstention. The District Court denied both motions. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1) (West Supp. 1983), and defendants cross-appealed

On June 6, 1983, by a two to one vote, the Court of Appeals declared section 93 invalid (App. A, 31a; 33a)

and entered judgment reversing the denial of the preliminary injunction, remanding for further proceedings, and dismissing the cross-appeals for lack of jurisdiction (App. G). Although the Court dismissed the cross-appeals, it considered the issue raised on the cross-appeals, abstention, as a possible ground for upholding the District Court's denial of the preliminary injunction, and determined the issue on its merits against defendants (App. A, 13a).

The Honorable Edward Becker, Circuit Judge, dissented, contending that section 93 is not preempted. Judge Becker also contended that the court had jurisdiction over the cross-appeals, stating: "Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstension is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief" (App. A, 40a, n.2). *See also,* 9 *Moore's Federal Practice,* §110.25 at 271 (2 ed. 1970); *Kershner* v. *Mazurkiewicz,* 607 F. 2d 440 (3 Cir. 1982); *Genosick* v. *Richmond United School District,* 479 F. 2d 482, 483 (9 Cir. 1973).

Defendants petitioned for rehearing *in banc* on June 20, 1983. The petition was denied by an evenly divided Court on June 30, 1983. Defendants filed notices of appeal to this Court on July 18 and August 3, 1983 (App. I).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2) (1966). Although the Court of Appeals remanded for further proceedings, presumably the issuance of a permanent injunction, it is clear that the unconstitutionality of section 93 has been definitely and finally adjudicated, that New Jersey has been enjoined from enforcing the statute, and thus that the present appeal lies under §1254(2). *City of New Orleans* v. *Dukes,*

427 U.S. 297, 301-302 (1976). The statute having been declared unconstiutional, the entry of the permanent injunction by the District Court would be a mere formality.

In addition, there are claims in Plaintiffs' complaint which were not adjudicated by the Court of Appeals. There is a claim that section 93 is violative of the First Amendment, which the Court declined to address because it had found the statute unconstitutional on preemption grounds (App. A, 37a). There is also a claim for money damages, as to which there is a motion to dismiss on the ground of sovereign immunity pending in the District Court. However, it is clear that the First Amendment question is now moot and that the damage claim has no bearing on the constitutionality of section 93. Thus, as the Court said in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302, "the policy underlying §1254(2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented."

It is therefore respectfully submitted that the preemption issue, and the abstention issue which is inextricably bound therewith, are properly before this Court.

Constitutional Provisions and Statutes Involved

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing

in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), provides in pertinent part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal em-

> ployee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The full text of section 93 is reproduced in Appendix N. Other relevant statutes are reproduced in Appendices J through O.

Statement of the Case

In November 1976 the voters of New Jersey approved an amendment to the state consitution permitting casino gambling within the municipality of Atlantic City. N.J. Stat. Ann. Const. (1947), Art. 4, §7, par. 2D (West Supp. 1983). In June 1977 the state Legislature adopted the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-1 *et seq.* (West Supp. 1983) (the Act), which put in place an extraordinarily pervasive and intensive system of regulation of the nascent Atlantic City casino industry.

An integral part of that regulatory system is embodied in section 93 of the Act. N.J. Stat. Ann. 5:12-93 (West Supp. 1983) (App. N). Section 93 requires labor organizations which represent or seek to represent persons employed in casinos or casino hotels to register annually with Appellant New Jersey Casino Control Commission (Commission). Section 93 further provides that no labor organization which is registered or required to be registered may receive dues from casino industry workers, or administer pension or welfare funds, if any "officer, agent or principal employee" of such labor organization is disqualified under

section 86 of the Act. N.J. Stat. Ann. 5:12-86 (West Supp. 1983) (App. O). Section 86 enumerates certain disqualifying criteria applicable to persons involved in the ownership, financing, management and operation of casino hotels, persons who do business with casino hotels, as well as officers, agents and principal employees of labor organizations covered by section 93. Among the disqualifying criteria of section 86 are the commission of certain criminal offenses, N.J. Stat. Ann. 5:12-86(c) (West Supp. 1983), and associations with members of organized crime if such associations are found by the Commission to be inimical to the policies of the Act and to gaming operations. N.J. Stat. Ann. 5:12-86(f) (West Supp. 1983).

Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) is the largest union operating in the New Jersey casino industry, and has registered under section 93. Following Local 54's registration, Appellant New Jersey Division of Gaming Enforcement (Division), a division of the Office of the New Jersey Attorney General, conducted an investigation and filed reports with the Commission in which it alleged that certain officials of Local 54 were disqualified under section 86 and requested the Commission to take appropriate remedial action under section 93. The Commission scheduled a hearing on the Division's allegations.

Local 54 filed a complaint in the Federal District Court for the District of New Jersey, alleging that sections 86 and 93 are unconstitutional and seeking, *inter alia*, to enjoin the Commission and the Division from enforcing these sections against it. The District Court denied Local 54's request for a preliminary injunction, and also denied the motions of the Commission and the Division to dismiss the complaint on the ground of abstention (App. B). Local 54 appealed the District Court's order denying the prelimi-

nary injunction to the United States Court of Appeals for the Third Circuit, and the Commission and the Division cross-appealed, alleging that the District Court erred in refusing to abstain from exercising jurisdiction.

During the pendency of the appeal and cross-appeals, the Commission held a hearing on the allegations in the reports filed by the Division. Following the hearing, the Commission found that three officials of Local 54 were disqualified under section 86, two because they are associated with members of organized crime and conduct union affairs under the influence of those criminal associates, and the third because of a criminal conviction for interference with commerce (extortion), aiding and abetting and conspiracy (App. D). The Commission ordered the removal of these three officials and stated that, if they were not removed, Local 54 would be prohibited from collecting dues from workers in the Atlantic City casino industry (App. E). The Commission determined not to utilize the alternative statutory remedy of prohibition of pension and welfare fund administration, noting that the dues prohibition remedy was sufficient to effect the removal of the disqualified officials, which is the statute's only intent and the Commission's only objective (App. F, 212a-215a).

Following the Commission's decision and order, the United States District Court issued an order enjoining the Commission and the Division from taking any steps to enforce section 93 against Local 54 pending resolution of the appeal and cross-appeals in the United States Court of Appeals (App. C).

The Court of Appeals reversed the denial of the preliminary injunction. The majority of the Court ruled that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), insofar as it empowers the Commission to disqualify elected union officials

(App. A, 31a), and is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975), insofar as it empowers the Commission to prohibit administration of pension and welfare funds (App. A, 32a-33a). The majority also held that the Court was without jurisdiction over the cross-appeals, but considered the abstention arguments advanced by the Commission and Division as a possible alternative ground for upholding the denial of the preliminary injunction. The majority ruled that the District Court did not err in declining to abstain (App. A, 36a-37a).

The Honorable Edward Becker, Circuit Judge, dissented. Although Judge Becker agreed with the majority that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act (App. A, 38a), he found that section 93 is otherwise valid. Based on his analysis of congressional labor policy and "in view of the colossal problems associated with casino gambling, and New Jersey's interest in preventing the incidence of such problems and the poisoning of its polity," Judge Becker concluded that "federal labor law does not preempt the Casino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials" (App. A, 42a-43a). Judge Becker also dissented from the ruling that the Court was without jurisdiction over the cross-appeals (App. A, 40a, n.2), but agreed that abstention is inappropriate in this case (App. A, 42a, n.3).

The Commission and the Division petitioned the Court of Appeals for a rehearing *in banc*. The Court, by vote of five to five, denied the petition (App. H). The Honorable Arlin Adams, Circuit Judge, who voted to deny the petition, issued the following statement sur petition for rehearing:

This appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. The decision of this Court not to rehear the matter *in banc*, should not be taken as a sign that it considers the matter unworthy of careful scrutiny by the full Court. Rather, I believe that the determination not to consider the case *in banc* may be understood as an acknowledgement of the thorough discussion set forth in the majority and dissenting opinions which have laid out the arguments for each side in considerable detail.

Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance of the nation's highest tribunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court. (App. H, 222a-223a)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

POINT I

The ruling below, that New Jersey is powerless to prevent the subversion of its casino industry through criminal infiltration of the industry's labor organizations, is based on a misapprehension of the doctrine of federal preemption.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . . .

At issue in the present case is whether section 7 preempts section 93 of the Casino Control Act.[2]

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, mandates preemption of any state law which "stands as an obstacle to the objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). However, the "exercise of federal supremacy is not lightly to be presumed," *New York State Dep't of Social Serv.* v. *Dublino*, 413 U.S. 405,

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[2] The question whether the section 93 remedy relating to pension and welfare fund adminstration is preempted by the Employee Retirement Income Security Act need not have been addressed by the Court of Appeals and need not be addressed by this Court, because that remedy was not invoked by the Commission. In addition, in view of the broadly-framed severability clause of the Casino Control Act, N.J. Stat. Ann. 5:12-133(a) (West Supp. 1983), it is clear that this remedy, should it ultimately be found unconstitutional, could be severed without altering the character or purpose of section 93.

413 (1973), and, indeed, it is not favored in the absence of a persuasive showing that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

Congress has refrained from providing any specific direction with respect to the preemptive effect of the National Labor Relations Act. *See Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 295 (1977). This Court has therefore developed a preemption doctrine based primarily on two competing considerations—the need for uniform national labor regulation under the NLRA, and the recognition that state regulation of activity which is merely a peripheral concern of the NLRA, or which touches interests deeply rooted in local feeling and responsibility, must be allowed to stand. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 233-244 (1959); *Farmer* v. *Carpenters Local 25, supra*, at 295-296. Most recently, in *Local 926, Inter. Union of Oper. Eng.* v. *Jones*, —— U.S. ——, 103 S. Ct. 1453, 1458-1459 (1983), the Court reiterated its approach to NLRA preemption issues as follows:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S., at 245, 79 S. Ct., at 779; [other citations omitted]. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion", *Sears, Roebuck & Co.* v. *Carpenters*, [436 U.S. 180] at 188, 98 S. Ct., [1745] at 1752 [(1978)], if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra*, 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the con-

> duct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra,* 359 U.S., at 243-244, 79 S. Ct., at 778.

In the present case the majority of the Court of Appeals misapprehended the applicable Supreme Court law, and ruled that where it is clear or may fairly be assumed that activity which a state seeks to regulate is protected by section 7, preemption "is absolute," and that in such cases "there is neither occasion nor justification for engaging in weighing or balancing" of competing federal and state interests (App. A, 27a-28a). The majority further concluded that such weighing and balancing are only required where the conduct which the State seeks to regulate is not protected by section 7, "but is nevertheless federally regulated" (App. A, 27a).

As Judge Becker pointed out in his dissent, the majority's formulation is based on an inaccurate distinction and an oversimplification of the proper preemption analysis (App. A, 44a). Judge Becker engaged in the weighing and balancing which the majority refused to perform. Clearly, Judge Becker's approach to the preemption analyses was the correct one. As this Court explained in *Local 926, Inter. Union of Oper. Eng.* v. *Jones, supra,* 103 S. Ct. at 1458:

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause

> of action to the state as a protection to its citizens. See *Sears, supra,* 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra* 430 U.S., at 297, 97 S. Ct., at 1061.

The correctness of Judge Becker's approach is made even more manifest by reference to *DeVeau* v. *Braisted,* 363 U.S. 144 (1960), where the Court upheld a statute remarkably similar to section 93. *DeVeau* involved a challenge to section 8 of the New York Waterfront Commission Act, McK. Unconsol. Laws, §6700aa *et seq.,* which prohibits the collection of dues from waterfront employees by any union with an officer or agent who has been convicted of a felony and has not been pardoned or granted a "certificate of good conduct." In upholding the statute, Justice Frankfutrer (plurality op.), at 152, stated:

> The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

When the required balancing of the federal and state interests involved in the present case is performed, the result must be the same as that reached in *DeVeau* and by Judge Becker, *i.e.,* that section 93 of the Casino Control Act is not preempted by section 7 of the NLRA.

Judge Becker concluded that the concerns of New Jersey's Legislature and citizenry embodied in section 93 "cannot be characterized as anything less than 'deeply rooted in a local feeling and responsibility'" (App. A, 72a). The District Judge had reached the same conclusion in his opin-

ion (App. B, 106a). Indeed, this conclusion is manifest in light of the history and purpose of section 93.

As Judge Becker noted, gambling has been described by the FBI as the "lifeblood of organized crime" (App. A, 65a), and legalized casino gambling, where millions of dollars continually change hands in thousands of unrecorded cash transactions, is uniquely susceptible to criminal infiltration (App. A, 66a). This susceptibility, combined with the well-known history of organized crime involvement in casino gambling in other jurisdictions, led the citizens of New Jersey to defeat a 1974 referendum to allow casino gambling. The 1976 referendum was passed only after the people of New Jersey were promised the "strongest regulations of casinos in the world" (App. A, 66a).

Following voter approval, the New Jersey Legislature conducted extensive hearings, at which it was demonstrated that the integrity of the casino industry and public confidence in the regulatory process could only be assured through the strictest regulation of casinos and of all ancillary activities. In the words of the Governor's staff policy group on casino gaming: "The uniqueness of the industry, taken with its potential societal consequences and its checkered history in other jurisdictions, compels a state regulatory interest in virtually every aspect of casinos and related operations" (App. A, 67a). The statutory and administrative controls which the Legislature put in place have been described by the New Jersey Supreme Court as "extraordinary pervasive and intensive," *Knight* v. *City of Margate*, 86 N.J. 374, 381, 431 A.2d 833, 836 (1981), and as designed to regulate all aspects of the casino industry with the "utmost strictness." *Id.*, 86 N.J. at 392, 431 A.2d at 842; *Bally Manufacturing Corp.* v. *N.J. Casino Control Commission*, 85 N.J. 325, 426 A.2d 1000 (1981), appeal dism. 454 U.S. 804 (1981); *In re Martin, et al.*, 90 N.J. 295, 447 A.2d 1290 (1982).

During the hearing process, the Legislature was specifically advised by the New Jersey State Commission of Investigation that there are "few better vehicles" for organized crime to gain a stronghold in the casino industry than through labor racketeering (App. A, 69a). It is therefore not surprising that the Legislature included section 93 in the Casino Control Act. Section 93 is an essential and integral part of New Jersey's overall effort to regulate its casino industry, and the policies embodied in section 93 cannot be characterized as anything less than deeply rooted in local feeling and responsibility. Had the majority of the Court of Appeals considered the question, surely it, like the dissent, would have so concluded.

It is equally clear that section 93 does not represent a disruption of federal labor policy. Section 93 applies to a single, unique, local industry. In addition, as the Court ruled in *DeVeau* v. *Braisted,* with respect to section 8 of the Waterfront Commission Act, section 93 does not contradict any federal labor enactment and can operate in harmony with federal labor policy. Like section 8 of the Waterfront Commission Act, section 93 does not deprive workers of the right to choose bargaining representatives, but merely restricts their right to choose insofar as necessary to protect them from being represented by convicted criminals and persons who conduct union affairs under the influence of organized crime. *Cf. DeVeau* v. *Braisted, supra,* 363 U.S. at 152.

Congress itself has expressly recognized the danger of criminal infiltration of the labor movement, by adopting section 504(a) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §504(a) (1975), which prohibits individuals convicted of certain felonies from holding union office for five years. Sections 93 and 86 of the

Casino Control Act do not contradict section 504, although they include more disqualifying criteria, N.J. Stat. Ann. 5:12-86(b) through (h) (West Supp. 1983), and extend the period of disqualification to 10 years N.J. Stat. Ann. 5:12-86(c)(4) (West Supp. 1983). Rather, as Judge Becker pointed out, sections 93 and 86 support the congressional policy of stamping out crime and corruption in unions and guarantying internal union democracy (App. A, 58a). The casino industry, by its very nature, is uniquely susceptible to criminal infiltration, and has a long history of criminal involvement. It is clear from the purpose and legislative history of section 504(a) that the imposition of more restrictive eligibility requirements to this unique, localized industry is complimentary, not contradictory, to the Labor Management Reporting Disclosure Act (App. A, 55a-59a).

Indeed, in section 603(a) of the LMRDA, 29 U.S.C. §523(a) (1975), Congress provided that "nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward or other representative of a labor organization . . . under the laws of any State." Although the majority in the present case said that section 603(a) only applies to state law remedies for breach of fiduciary duties by union officials (App. A, 24a-27a), the dissent pointed out that there is no support for such a restrictive reading in the legislative history. The dissent further noted that in *DeVeau* v. *Braisted, supra,* Justice Frankfurter, speaking for the plurality, and Justice Brennan, who provided the fifth vote to uphold section 8 of the Waterfront Commission Act, expressly stated that section 603(a) applies to section 504(a) (App. A, 57a-58a). In fact, Justice Frankfurter said that, in view of section 603(a), "no inference could possibly arise that section 8 is impliedly preempted by section 504(a)." *DeVeau* v. *Braisted, supra,* 363 U.S. at 157.

The majority opinion of the Court of Appeals dismissed *DeVeau* out of hand because the Waterfront Commission Act was embodied in a New York-New Jersey bistate compact which was approved by Congress (App. A, 28a-29a). The majority noted that the *DeVeau* Court, in ruling that section 8 of the Waterfront Commission Act is not preempted by section 7 of the NLRA, relied on the specific expression of congressional intent embodied in the approval of the compact. However, the Court in *DeVeau* at no time indicated that, absent the bistate compact, it would have found section 8 of the Waterfront Act invalid, and the opinion, read as a whole, compels the opposite conclusion. The *DeVeau* Court performed the balancing of federal and state interests which the majority in the present case eschewed, and found that section 8 could exist in harmony with the NLRA.

Nevertheless, the majority in the present case ignored *DeVeau* and placed its primary reliance on *Hill* v. *Florida*, 325 U.S. 538 (1945). In *Hill* the Court reviewed a Florida statute which required union business agents to obtain a license from the state. The license could be denied to anyone who had not been a citizen for more than 10 years, who had been convicted of a felony, or who was not of good moral character. Criminal penalties could be imposed on anyone who functioned as a business agent without a license. This Court ruled that the informational filings required by the statute were not unconstitutional, but that the misdemeanor penalty was unconstitutionally broad because it infringed upon the right of unions to act as collective bargaining representatives. *Id.* at 543.

In contrast to section 93, the statute invalidated in *Hill* applied to *all* labor unions operating in Florida. The statute was broadly written, imposing such standards as "good moral character." The statute, unlike

section 93 and section 8 of the Waterfront Commission Act, was not part of an overall legislative scheme designed to address a specific and vital state interest.

In addition, *Hill* was decided prior to the express manifestations of congressional policy apparent in the adoption of section 504(a) of the LMRDA and approval of the bistate compact involved in *DeVeau*. In light of these later expressions of national labor policy, Judge Becker disagreed "with the majority's conclusion that the *Hill* Court's reading of congressional intent remains either definitive or controlling" (App. A, 47a-48a). The continuing validity of *Hill* has also been questioned elsewhere. *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 406 (2 Cir. 1968) *cert.* den. 391 U.S. 934 (1969). At any rate, the question of it validity aside, *Hill* is clearly distinguishable from the present case.

In summary, Appellate Casino Control Commission respectfully submits that the Court of Appeals erroneously invalidated section 93 of the Casino Control Act, thereby depriving New Jersey of an essential weapon in the battle to maintain the integrity of its casino industry. In addition to the vital interests of the State of New Jersey at stake, this case also presents broader questions meriting this Court's attention. The majority opinion of the Court of Appeals announces a new and potentially far-reaching theory of absolute NLRA preemption, which runs counter to this Court's consistent policy and requires immediate correction.

It is clear, as Judge Adams said in his statement sur petition for rehearing (App. H), that this appeal "presents an extremely important issue concerning the proper balance of state and federal authority over labor unions . . . ." In Judge Adams' view, and in the view of the

Commission, this is "a question central to the concept of federalism," meriting full exploration by this Court "so that all federal courts would have the benefit of guidance of the nation's highest tribunal on this crucial topic."

POINT II

The opinion of the Court of Appeals announces a new and wholly unjustified exception to the doctrine of abstention.

The Appellants moved before the District Court to dismiss the complaint in this matter on the ground of abstention, raising, *inter alia*, the abstention doctrine first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine, as developed in such subsequent cases as *Moore* v. *Sims*, 422 U.S. 415 (1979); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977) and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), estabishes that, absent extraordinary circumstances, federal courts will not interfere with ongoing state proceedings brought to vindicate important state interests. Although *Younger* involved a request to enjoin an ongoing state criminal proceeding, it is now clear that the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved," *see Moore* v. *Sims, supra; Middlesex County Ethics Committee* v. *Garden State Bar Association*, 454 U.S. 962 (1982), including state administrative proceedings that "command the respect due court proceedings." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973); *Geiger* v. *Jenkins*, 401 U.S. 985 (1971).

It is clear beyond question that important state interests are involved in the proceedings initiated before the Com-

mission. It is also clear that the proceedings before the Commission were conducted in a trial-type atmosphere with the full panoply of due proces rights. *See* N.J. Stat. Ann. 5:12-107 (West Supp. 1983).

It is true that Local 54 was not afforded the opportunity to test the constitutionality of section 93 of the Casino Control Act during the administrative proceedings, the Commission having ruled that it lacks power as an administrative agency to rule on the constitutionality of its enabling statute. However, the state court system is fully competent to address the constitutional issues. Pursuant to N.J. Ct. R. 2:5-6, Local 54 could have applied for leave to appeal to the New Jersey Superior Court, Appellate Division, from the Commission's interlocutory decision declining to rule on the constitutionality of the statute. Moreover, the Casino Control Act, N.J. Stat. Ann. §5:12-110(a) (West Supp. 1983), and the New Jersey Court Rules, N.J. Ct. R. 2:2-3(a)(2), insure the right of appeal to the Superior Court, Appellate Division from the final decision of the Commission. In fact, Local 54 has appealed to the Appellate Division and has raised its constitutional arguments on that appeal. At Local 54's request, that appeal was dismissed without prejudice after the issuance of the Third Circuit opinion. However, it is clear that the State has provided "a forum competent to vindicate any constitutional objections" which Local 54 seeks to raise, and therefore that federal court intervention is unwarranted. *Huffman* v. *Pursue, supra,* 420 U.S. at 604.

Where, as here, the trial phase of the state proceedings has been completed, federal court intervention is particularly inappropriate, because it deprives the state of its legitimate function of providing appellate court review. The principles of comity and federalism which

underly *Younger* are ill served when federal courts substitute themselves for state appellate courts. As this Court noted in *Huffman* v. *Pursue, supra,* 420 U.S. at 608-609, such intervention is even more disruptive and offensive than pre-trial intervention by federal courts, and is "also a direct aspersion on the capabilities and good faith of state appellate courts."

In the present case the Federal District Court declined to apply *Younger* abstention because "the state proceedings have not been initiated by the state itself" (App. B, 91a). On appeal, the Commission and Division argued that the proceedings against Local 54 clearly were initiated by the state, and that, in any event, the controlling consideration is the presence of an important state interest, not initiation by the state.

The Circuit Court also declined to apply *Younger* abstention, but did not mention the "state initiation" test utilized by the District Court. Rather, both the majority and dissenting opinions of the Circuit Court reasoned that the principles of *Younger* are not applicable here because Local 54 challenged the state's right to maintain the administrative proceedings. In the words of the majority:

> . . . when the issue tendered to the federal district court is the very power, as a matter of federal law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger* v. *Harris* rule are totally inapplicable. (App. A, 36a-37a).

The dissent essentially agreed, stating that while "at first blush, this case appears to fall within the class of cases in which the district courts should abstain from adjudicating the claims at issue," abstention is nonetheless inapplicable here because:

> Where an individual who is subject to state proceedings to which the federal courts would otherwise defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. (App. A, 42a, n.3).

In ruling that the mere assertion that federal law protects against maintenance of the state proceedings renders *Younger* inapplicable, both the majority and the dissent overlooked the fact that *Younger* itself dealt with a First Amendment challenge to the state statute under which a criminal trial was being conducted. Nevertheless, this Court declared that the mere holding of the state proceeding did not constitute irreparable harm justifying equitable relief in federal court. *Younger* v. *Harris, supra,* 401 U.S. at 46, 48-49. In the present case the District Court specifically ruled that the holding of the hearing before the Commission would not constitute irreparable harm (App. B, 107a-108a; 125a-128a), and neither of the opinions in the Court of Appeals expressed any contrary conclusion. It is therefore unclear why the fact of a challenge to the legitimacy of state proceedings justifies federal court intervention in a case otherwise within the purview of *Younger.*

In support of its conclusion, the majority cited *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Ed.,* 654 F. 2d 868 (3 Cir. 1981), for the proposition that, "absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1966), escape any federal appellate review for long periods" (App. A, 36a). The issue in the *New Jersey-Philadelphia Presbytery* case was

the applicability of *Younger* to a federal suit instituted by persons who were not parties to an ongoing state action. The Court said that where such persons cannot intervene in the state action, and can only protect their interests in a separate action under 42 U.S.C. §1983 (1981), they might legitimately choose the federal forum because the Supreme Court can review interlocutory injunctive orders of lower federal courts but can only review final judgments of state courts. 654 F.2d at 883-884. The *New Jersey-Philadelphia Presbytery* opinion was issued over a vigorous dissent, which pointed out that the majority misperceived the extent of Supreme Court appellate jurisdiction. 654 F.2d at 904-905. At any rate, even the majority opinion in *New Jersey-Philadelphia Presbytery* did not suggest that *Younger* is inapplicable whenever it is claimed that an order of a state court or agency restrains the exercise of some federal right. In fact, *Younger* itself involved a claim that the California Criminal Syndication Act inhibited the exercise of First Amendment rights, 401 U.S. at 784, and the *Younger* opinion does not even mention the possibility that such an allegation could provide a justification for a federal court to enjoin an ongoing state proceeding. To the contrary, *Younger* denounced the implicit denial of the equal ability of the state courts to order a fair and competent determination of federal issues which inheres in such an assertion.

As additional authority, the majority in the present case cited *In re Green's Petition*, 369 U.S. 689 (1962), and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), for the proposition that "the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter" (App. A, 36a). These cases did involve section 7

rights and did hold that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." *In re Green's Petition,* 369 U.S. at 694; *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U.S. at 386, 399. However, this was a holding of general applicability and was not related to any particular significance granted section 7 rights. In addition, these cases came to this Court on *certiorari* from the highest courts of the states involved, and did not entail federal intervention in ongoing state proceedings.

Finally, the majority cited *Capitol Service, Inc.* v. *NLRB,* 347 U.S. 501 (1954), and *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138 (1971), for the proposition that "[e]ven pending state proceedings may be enjoined on preemption grounds" (App. A, 36a). Both of these cases involved attempts by the National Labor Relations Board to restrain enforcement of injunctions issued by state courts against peaceful picketing. In both cases the sole issue was whether the so-called Anti-Injunction Act, 28 U.S.C. §2283 (1978), precluded the granting of the requested relief. In *Capitol Services* the Court held that §2283 did not apply because the granting of injunctive relief by the District Court was "necessary in aid of its jurisdiction." 347 U.S. at 506. In *Nash-Finch,* the Court held that suits brought by the NLRB fall within the "suits brought by the United States" exception to §2283. 404 U.S. at 144-147. In neither case was abstention raised or discussed.

The majority of the Court of Appeals stated that the cases discussed above "suggest" that *Younger* is inapplicable where a federal plaintiff challenges the propriety of state proceedings (App. A, 36a-37a). It is respectfully submitted that these cases do not support the conclusion reached by the Court, and that *Younger* itself clearly precludes that conclusion.

The dissent placed its reliance on cases involving claims of double jeopardy (App. A, 42a, n.3). For example, the dissent cited *Abney* v. *United States*, 431 U.S. 651 (1977), holding that a denial of a claim of double jeopardy is an appealable collateral order, and *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034, 1037, (3 Cir. 1975), holding that pretrial *habeas corpus* relief is available to a defendant who seeks to avoid trial on the ground of double jeopardy and whose double jeopardy claims have been denied by the state's highest court. These cases, and the others cited by the dissent, are grounded on the notion that the prohibition of double prosecution for a single offense is intended to spare defendants the embarrassment, expense and ordeal of a second trial. *Abney*, 431 U.S. at 661-662; *Webb*, 516 F.2d at 1040-1041. In *Younger* the Court, in discussing the showing of irreparable harm which is necessary to justify federal injunctive relief against an ongoing state proceeding, stated:

> Certain types of injury, in particular, the cost, anxiety, and inconveninece of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. (401 U.S. at 46).

Thus, the cases cited by the dissent present a unique situation in which a trial itself constitutes an injury against which a defendant is afforded federal constitutional protection, as contrasted with the *Younger* case, and the present case, in which the holding of the state proceeding does not constitute an irreparable injury justifying federal court intervention. The cases cited by the dissent clearly do not support the conclusion that a plaintiff is entitled to federal

relief whenever there is an allegation that some federal constitutional or statutory right entitles him to avoid participating in a pending state proceeding.

In summary, it is respectfully submitted that both the majority and dissenting opinions have announced a novel, ill-conceived, and unsupported exception to the *Younger* rule. If this exception is allowed to stand, and federal plaintiffs can avoid the impact of *Younger* merely by alleging that they should not be subjected to state proceedings, the principles of comity and federalism underlying the *Younger* abstention doctrine will be rendered meaningless.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

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* Counsel of Record

DATED: September, 1983

SEE COMPANION CASE

SEE COMPANION CASE

NO. 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN, DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR APPELLANTS

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Questions Presented

1. Should the federal courts abstain from exercising jurisdiction over a suit seeking to enjoin an ongoing state administrative proceeding, where the state proceeding was brought by the New Jersey Attorney General in furtherance of New Jersey's vital interest in maintaining the integrity of its casino industry?

2. Does the National Labor Relations Act preempt section 93 of the New Jersey Casino Control Act which, as part of a pervasive and intensive system of casino industry regulation, excludes persons from serving in positions of authority in casino industry labor unions where those persons have been convicted of certain crimes or have been found to conduct union affairs under the influence of organized crime?[1]

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[1] The following are the parties to the United States Court of Appeals proceeding from which this appeal is taken: Hotel and Restaurant Employees and Bartenders International Union Local 54; Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54; New Jersey Casino Control Commission; Martin Danziger, Acting Chairman; Don Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner; State of New Jersey Department of Law and Public Safety, Division of Gaming Enforcement; G. Michael Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement; Thomas Kean, Governor, State of New Jersey. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Section 331, were permitted to intervene in the District Court, but did not participate in the proceedings before the Circuit Court.

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Appendix

The following items are contained in appellants' appendix to their jurisdictional statements:

The following items are contained in the parties' joint appendix to the briefs on the merits:

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NO. 83-573

IN THE

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OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY;

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Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3 Cir. 1983) and is reproduced at A1a-A77a.[2] The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) and is reproduced at A78a-A128a. The opinion and supplemental opinion of the New Jersey Casino Control Commission are unreported and are reproduced at A131a-A205a and A208a-A215a.

Jurisdiction

These proceedings involve a claim that section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), is invalid under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI cl. 2, because it is preempted by federal labor legislation. The District Court found that federal jurisdiction was properly invoked under 28 U.S.C. §1331 (West Supp. 1983) and 28 U.S.C. §1337 (West Supp. 1983) (A90a).

Plaintiffs, a labor union and its president, moved in the District Court for a preliminary injunction against enforcement of section 93 (JA49a-JA54a). Defendants, the New Jersey officials charged with implementation of the Casino Control Act, moved to dismiss the complaint on the ground of abstention (JA55a-JA56a). The District Court denied both motions. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1) (West Supp. 1983), and defendants cross-appealed.

On June 6, 1983, by a two to one vote, the Court of Appeals declared section 93 invalid (A31a; A33a) and entered judgment reversing the denial of the preliminary injunction, remanding for further proceedings, and dismissing the cross-appeals for lack of jurisdiction (A217a-A219a). Although the Court dismissed the cross-appeals,

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[2] The appendix to appellants' jurisdictional statements is referred to as "A-a." The joint appendix to the parties' briefs on the merits is referred to as "JA-a."

it considered the issue raised on the cross-appeals, abstention, as a possible ground for upholding the District Court's denial of the preliminary injunction, and determined the issue on its merits against defendants (A13a).

The Honorable Edward Becker, Circuit Judge, dissented, contending that section 93 is not preempted. Judge Becker also contended that the Court had jurisdiction over the cross-appeals, stating: "Since injunctive relief should not be granted if abstention is required, it seems quite clear that the propriety of abstention is inextricably bound with the review of a decision to grant or to deny preliminary injunctive relief" (A40a, n.2). *See also,* 9 *Moore's Federal Practice,* §110.25 at 271, 273 (2 ed. 1970); *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, 287 (1940); *Kershner* v. *Mazurkiewicz,* 670 F.2d 440 (3 Cir. 1982) (*in banc*); *Genosick* v. *Richmond United School District,* 479 F.2d 482, 483 (9 Cir. 1973); *Semmes Motors, Inc.* v. *Ford Motor Co.,* 429 F.2d 1197, 1201 (2 Cir. 1970); *Hurwitz,* v. *Directors Guild of America, Inc.,* 364 F.2d 67, 70 (2 Cir. 1966), *cert.* den., 385 U.S. 971 (1966). However, Judge Becker agreed with the majority that the District Court did not err in declining to abstain.

Defendants petitioned for rehearing *in banc* on June 20, 1983. The petition was denied by an evenly divided Court on June 30, 1983. Defendants filed notices of appeal to this Court on July 18 and August 3, 1983 (A224a-A234a). Plaintiffs filed a motion to affirm. On November 28, 1983, this Court noted probable jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2) (1966). Although the Court of Appeals remanded for further proceedings, presumably the issuance of a permanent injunction, it is clear that the unconstitutionality of section 93 has been definitely and finally adjudicated, that New Jersey has been enjoined from enforcing the statute, and thus that the present appeal lies under §1254(2). *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301-302 (1976). The statute having been declared unconstitutional, the entry of the permanent injunction by the District Court would be a mere formality.

There are claims in plaintiffs' complaint which have not been adjudicated. First, there is a claim that section

93 is violative of the First Amendment, which the Court of Appeals declined to address because it had found the statute unconstitutional on preemption grounds (A37a). There is also a claim for money damages, as to which there is a motion to dismiss on the ground of sovereign immunity pending in the District Court. However, it is clear that the First Amendment question is now moot and that the damage claim has no bearing on the constitutionality of section 93. Thus, as the Court said in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302, "the policy underlying §1254(2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented."

It is therefore respectfully submitted that the preemption issue, and the abstention issue which is inextricably bound therewith, are properly before this Court.

Constitutional Provision and Statutes Involved

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (1973), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement re-

> quiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), provides, in pertinent part:

> a. Each labor organization, group or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually. . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

The full text of section 93 is reproduced at A246a-A247a. Other relevant statutes are reproduced at A235a-A255a and JA59a-JA64a.

Statement of the Case

In November 1976 the voters of New Jersey approved an amendment to the state Constitution permitting the Legislature to authorize casino gambling within the municipality of Atlantic City, so long as all state revenues derived therefrom were dedicated to reducing property taxes and utility bills of senior citizens and disabled residents. N.J. Stat. Ann., Const. (1947), Art. IV, §7, par. 2D (West Supp. 1983).[3] In June 1977 the state Legisla-

[3] A subsequent amendment, in 1981, permitted revenues to also be used for health and transportation benefits for senior citizens and disabled residents.

ture adopted the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-1 *et seq.* (West Supp. 1983) (the Act), which authorized casino gaming in Atlantic City and put in place an extraordinarily pervasive and intensive system of regulation of the nascent casino industry.

The Act declares that it is the public policy of New Jersey to extend strict regulation to all persons participating in the casino industry and related activities, N.J. Stat. Ann. 5:12-1(b)(6) (West Supp. 1983), and that it is in the vital interest of New Jersey to prevent any direct or indirect participation of unsuitable persons in casino and ancillary operations. N.J. Stat. Ann. 5:12-1(b)(9) (West Supp. 1983).

In order to implement these legislative goals, the Act imposes strict licensure and qualification requirements on companies which own or operate casino hotels, N.J. Stat. Ann. 5:12-82(b) (West Supp. 1983); officers, directors, security holders, principal employees, etc. of such companies, N.J. Stat. Ann. 5:12-85(c) and (d) (West Supp. 1983); investors and financial backers of such companies, N.J. Stat. Ann. 5:12-84(b) (West Supp. 1983); persons involved in the operation of casinos, N.J. Stat. Ann. 5:12-9 and 89 (West Supp. 1983); other persons employed in casino hotels who have access to the casino, N.J. Stat. Ann. 5:12-7 and 90 (West Supp. 1983); and companies and individuals which provide goods and services to casino hotels, N.J. Stat. Ann. 5:12-12 and 92 (West Supp. 1983). In addition, the Act provides a system of registration for all persons who work in casino hotels without having access to the casino. N.J. Stat. Ann. 5:12-8 and 91 (West Supp. 1983). The Act also requires appellant New Jersey Casino Control Commission (the Commission) to review all contracts entered into by casino hotels, on the basis of, *inter alia*, the qualification of the persons involved, and to terminate any such contracts which it disapproves. N.J. Stat. Ann. 5:12-104(b) (West Supp. 1983). Furthermore, the Act requires the Commission to assure that no unqualified, disqualified or unsuitable persons have any material involvement, direct or indirect, with casino

hotel operations. N.J. Stat. Ann. 5:12-64 (West Supp. 1983).

All of the licensure, qualification, registration and other regulatory provisions described above[4] encompass a series of disqualification criteria set forth in section 86 of the Act, N.J. Stat. Ann. 5:12-86 (West Supp. 1983). Among these disqualification criteria are the commission of certain designated crimes, N.J. Stat. Ann. 5:12-86(c) (West Supp. 1983), and identification as a "career offender" or member of a "career offender cartel," or as an associate of a career offender or member of a career offender cartel, if the association is found to be "inimical to the policy of this act and to gaming operations." N.J. Stat. Ann. 5:12-86(f) (West Supp. 1983). In most instances, the regulatory requirements described above also entail an affirmative burden of satisfying certain suitability criteria, principally good character, honesty and integrity, set forth in N.J. Stat. Ann. 5:12-89 (West Supp. 1983). *See,* N.J. Stat. Ann. 5:12-104(b), -92(b), -92(d), -90(b), -85(c), -84(b) and -64 (West Supp. 1983).

The Act, in section 93, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), also requires labor organizations which represent or seek to represent persons employed in casinos or casino hotels to register annually with the Commission. N.J. Stat. Ann. 5:12-93(a) (West Supp. 1983). Section 93 further provides that no labor organization which is registered or required to register may receive dues from any casino industry workers, or administer pension or welfare funds, if any "officer, agent or principal employee" of such labor organization is found to be disqualified under section 86, unless the Commission waives the disqualification consistent with the public policy of the Act and in the interests of justice. N.J. Stat. Ann. 5:12-93(b) (West Supp. 1983). Section 93 does not impose any affirmative suitability criteria.

The Act creates two state agencies, both appellants herein: the Commission, which has general responsibility for

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[4] The listing provided is by no means complete, but is merely illustrative.

implementing the Act and has adjudicatory and regulatory powers, *see*, N.J. Stat. Ann. 5:12-63 *et seq.* (West Supp. 1983); and the Division of Gaming Enforcement (the Division), within the Office of the Attorney General, which has investigatory and prosecutorial functions. *See*, N.J. Stat. Ann. 5:12-76 *et seq.* (West Supp. 1983).

Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 (Local 54) is the largest union operating in the New Jersey casino industry, and has registered under section 93 of the Act. Appellee Frank Gerace is the president of Local 54.

Following Local 54's registration, the Division conducted an investigation and, on May 11, 1981, filed a report with the Commission in which it alleged that Local 54's secretary-treasurer, Robert Lumio, and a member of its executive board, Frank Materio, were disqualified under section 86(c) by reason of criminal convictions, and that Lumio, Materio and union president Gerace were disqualified under section 86(f) by reason of organized crime associations.

The Commission scheduled a hearing on the allegations in the Division's report to commence on September 9, 1981. At a prehearing conference, Local 54 alleged that sections 86 and 93 were unconstitutional. The Commission ruled that as an administrative agency it was without authority to entertain facial challenges to the constitutionality of provisions of its enabling statute. Thereafter, on August 17, 1981, Local 54 and Gerace filed suit against the Commission, the Division and the State in the Federal District Court for the District of New Jersey, seeking a declaratory judgment that sections 86 and 93 are unconstitutional, temporary and permanent injunctive relief, and money damages. At the request of the District Court, the Commission agreed to postpone the scheduled hearing until the Court ruled on the motion for a preliminary injunction.

On March 22, 1982, the District Court denied Local 54's motion for a preliminary injunction, and also denied the motion of the Commission and Division, grounded in the principles of abstention, to dismiss the complaint (A78a-A128a).

Local 54 and Gerace appealed the District Court's order denying the preliminary injunction to the United States Court of Appeals for the Third Circuit, and the Commission and Division cross-appealed, alleging that the Court erred in refusing to abstain from exercising jurisdiction. Both the District Court and the Court of Appeals denied motions brought by Local 54 and Gerace seeking a temporary injunction pending appeal. The Commission therefore rescheduled the hearing on the allegations in the Division's report.

Before the hearing commenced, the Division filed a second report, in which it alleged that two Local 54 business agents, Eli Kirkland and Karlos LaSane, were disqualified under section 86(c) because of criminal convictions. The hearing, which encompassed the allegations in both of the Division's reports, began on June 8, 1982, and continued periodically until September 28, 1982.

On September 28, 1982, the Commission rendered an opinion (A131a-A205a) in which it analyzed the extensive testimonial and documentary evidence which had been presented to it, and concluded that Local 54 president Gerace and executive board member Materio were disqualified under section 86(f) because they were associated with members of organized crime and conducted union affairs under the influence of those criminal associates, and that union business agent LaSane was disqualified under section 86(c) because of a 1973 criminal conviction for interference with commerce (extortion), aiding and abetting and conspiracy. The Commissioner also found that business agent Kirkland had a disqualifying conviction, but found evidence of rehabilitation and waived the disqualification. The Commission ordered the removal of the three disqualified officials, and stated that, if they continued to serve after October 12, 1982, the union would be prohibited from collecting dues from workers in the Atlantic City casino industry (A206a-A207a). The Commission also directed the parties to submit briefs on the applicability of the addditional statutory remedy of prohibition of pension and welfare fund administration.

Following the Commission's decision and order, the United States District Court issued an order enjoining the Commission and Division from taking any further steps to enforce section 93 against Local 54 pending resolution of the appeal and cross-appeals pending in the United States Court of Appeals (A129a-A130a). The injunction specifically did not prohibit the Commission from considering the applicability of the additional section 93 remedy. On October 12, 1982, the Commission issued a second opinion (A208a-A216), in which it ruled that the two remedies in section 93 can be applied alternatively, and that the dues prohibition remedy was sufficient to effect the removal of the three disqualified Local 54 officials, which is the statute's only intent and the Commission's only objective. The Commission therefore determined not to apply the alternative statutory remedy of prohibition of pension and welfare fund administration.

On November 11, 1982, Local 54 and Gerace appealed the Commission's disqualification order to the Superior Court of New Jersey, Appellate Division. In due course, Local 54 and Gerace filed briefs raising, *inter alia,* the same issues raised in the then pending appeal in the United States Court of Appeals. The Commission and Division filed answering briefs.

On June 6, 1983, the United States Court of Appeals issued an opinion (A1a-A77a), in which the majority ruled that the District Court had erred in refusing to grant the preliminary injunction requested by Local 54 and Gerace. Specifically, the majority ruled that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1973), insofar as it empowers the Commission to disqualify elected union officials (A31a), and is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975), insofar as it empowers the Commission to prohibt administration of pension and welfare funds (A32a-A33a). The majority also held that the Court was without jurisdiction over the cross-appeals, but considered the abstention arguments advanced by the

Commission and Division as a possible alternative ground for upholding the denial of the preliminary injunction. The majority ruled that the District Court did not err in declining to abstain (A36a-A37a).

The Honorable Edward Becker, Circuit Judge, dissented. Although Judge Becker agreed with the majority that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act (A38a), he found that section 93 is otherwise valid. Based on his analysis of congressional labor policy and "in view of the colossal problems associated with casino gambling, and New Jersey's interest in preventing the incidence of such problems and the poisoning of its polity," Judge Becker concluded that "federal labor law does not preempt the Casino Control Act's restrictions on the right of casino-industry employees to select certain individuals as union officials" (A42a-A43a). Judge Becker also dissented from the ruling that the Court was without jurisdiction over the cross-appeals (A40a, n.2), but agreed that abstention is inappropriate in this case (A42a, n.3).

The Court of Appeals entered a judgment (A217a-A219a) reversing the judgment of the District Court and remanding for entry of an order enjoining the Commission and Division from taking any action, pending final hearing, to enforce section 93 against Local 54. The judgment also dismissed the cross-appeals for lack of jurisdiction.

The Commission and Division appealed to this Court. Local 54 and Gerace moved to dismiss the appeal in the Superior Court of New Jersey, Appellate Division, without prejudice, and the requested dismissal was granted.

Summary of Argument

I. Appellant New Jersey Casino Control Commission contends that, contrary to the ruling of the United States Court of Appeals, this case should be dismissed on the basis of the abstention doctrine first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971).

The primary relief sought in plaintiffs' complaint was an injunction against ongoing state administrative proceedings. Those proceedings were instituted by the New Jersey Attorney General in vindication of the State's vital interest in protecting the integrity of its casino industry. Although the proceedings were administrative in nature, in view of their importance to the State and the fact that full due process rights were accorded to the parties, they merit the same deference due state judicial proceedings. Admittedly, the administrative proceedings did not provide a forum for resolution of a constitutional attack on the statute under which they were instituted, but resort to the state appellate courts, either on an interlocutory basis or at the conclusion of the administrative hearing, was always available. At the conclusion of the hearing Local 54 and Gerace did appeal to the New Jersey Superior Court, Appellate Division, and raised the same constitutional issues presented in this federal suit.

Under the principles of federalism and comity devoloped in *Younger* and its progeny, the injunction ordered by the Court of Appeals is clearly inappropriate. The Court has enjoined ongoing state proceedings of vital interest to New Jersey and has substituted itself for the New Jersey appellate courts. In deference to the State and its institutions, the federal courts should abstain from exercising jurisdiction in this case, and the case should be dismissed.

The Court of Appeals declined to abstain on the theory that *Younger* is inapplicable because plaintiffs challenged the right of the State to maintain the pending administrative proceedings. However, the *Younger* Court ruled that the conducting of state proceedings does not constitute irreparable harm justifying federal equitable relief, and thus there is no reason why a challenge to the validity of such proceedings should render *Younger* inapplicable. The Court of Appeals has thus announced a novel and ill-conceived exception to *Younger* and the Commission respectfully submits that this Court should

reverse the judgment of the Court of Appeals and remand to the District Court for entry for an order dismissing the complaint.

II. The United States Court of Appeals, by a vote of two to one, found that section 93 of the New Jersey Casino Control Act is preempted by section 7 of the National Labor Relations Act, and is therefore unconstitutional under the Supremacy Clause.

The majority of the Court of Appeals ruled that section 93 limits the right of employees to bargain collectively through representatives of their own choosing, as guaranteed by section 7 of the NLRA, and therefore that section 93 is "absolute[ly]" preempted (A27a-A28a). However, as the applicable Supreme Court case law makes clear, and as the dissent in the Court of Appeals stated, the validity of section 93 cannot be adjudged without considering the deeply-rooted local interests which lead to its passage, as well as the minimal disruption of federal labor policy which it entails. The majority of the Court of Appeals specifically declined to engage in any such weighing and balancing of the state and federal interests at stake. The dissent did engage in this balancing process, and concluded that section 93 is valid. Indeed, this conclusion is manifest in light of the vulnerability of New Jersey's casino industry to criminal infiltration, and the history of such infiltration of the industry in other jurisdictions, as well as the slight intrusion on federal labor policy represented by New Jersey's efforts to keep persons with criminal records and organized crime associations out of its casino industry labor unions.

The Court of Appeals therefore erred in ruling that section 93 of the Casino Control Act is preempted by section 7 of the National Labor Relations Act. If this Court reaches the merits of the preemption issue, the Commission respectfully submits that the judgment of the Court of Appeals invalidating section 93 should be reversed.

ARGUMENT

I. In view of the ongoing state proceedings in this matter, the Court of Appeals should have abstained from exercising jurisdiction and ordered that the complaint be dismissed.

The Commission and Division moved the District Court to dismiss the complaint in this matter on the ground of abstention, raising, *inter alia*, the abstention doctrine first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971). The Court denied the motion (A91a). The Commission and Division raised the argument again on cross-appeal to the Circuit Court. The Court ruled, and the dissent agreed, that the District Judge was correct in declining to abstain.

In *Younger* v. *Harris* this Court reversed a District Court order enjoining a pending state criminal prosecution. The Court grounded its decision on the traditional doctrine that, absent extraordinary circumstances, a court of equity will not restrain a criminal prosecution, and on the "even more vital consideration" of "Our Federalism," *i.e.*, the principle of comity between the federal and state governments. The Court explained that this notion of comity includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fair best if the States and their institutions are left to perform their separate functions in separate ways." *Id.* at 45; *see also, Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Ex parte Young*, 209 U.S. 123 (1908).

Although *Younger* dealt with a state criminal prosecution, subsequent cases have established that "Our Federalism" also prohibits federal court intervention in state civil proceedings which involve the vindication or enforcement of "important state interests." *See, e.g., Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Moore* v. *Sims*, 442 U.S. 415 (1979). As this Court stated

in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982): "the policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved."

As discussed at length in Point Two of this brief, the state interests embodied in N.J. Stat. Ann. 5:12-93 and -86 (West Supp. 1983) are vital to New Jersey's struggle to assure the continuing viability and integrity of its casino industry. The Commission's hearing regarding Local 54 was conducted in furtherance of the State's compelling interest in attempting to prevent criminal involvement from strangling this fledgling industry. When compared to the interests at stake in the state proceedings involved in cases such as *Huffman* (action to enforce nuisance statute against pornographic theater), *Juidice* (contempt action for failure to appear at supplemental proceeding brought by judgment creditors), and *Trainor* (action seeking return of welfare payments and attachment of defendants' property), it is beyond dispute that the state interests involved here are sufficient to justify invoking the *Younger* doctrine in a civil context.

Nor should the fact the hearing which Local 54 sought to enjoin was before a state administrative agency rather than a court render the *Younger* abstention doctrine inapplicable.

Although the Casino Control Commission is not a court, it obviously acted in a judicial capacity in conducting the hearing in question in this case. The Commission adjudicated an action instituted by the state Attorney General against certain officials of Local 54. In so doing, the Commission accepted testimonial and documentary evidence, found facts, applied those facts to existing statutory law, and issued an appropriate order. This Court has consistently held that "the nature of a proceeding depends not on the character of the body but on character of the proceedings," and that a proceeding which "investigates, declares and enforces liabilities

as they stand on present or past facts and under laws supposed already to exist" is judicial. *District of Columbia Court of Appeals* v. *Feldman*, —— U.S. ——, 103 S. Ct. 1303, 1312 (1983), quoting *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210, 226 (1908). Clearly, the hearing involved here was judicial in nature.

In adopting the Casino Control Act, the New Jersey Legislature took great pains to assure that adjudicative hearings before the Commission, such as the one involved here, would be held in a trial-type atmosphere and with the full panoply of due process protections. As previously noted, the Act creates two agencies, and thus separates the investigatory and prosecutorial functions, which are placed in the Division, from the adjudicative function, which is placed in the Commission.

With regard to Commission hearings, the Act provides procedures for the filing and service of complaints and answers, N.J. Stat. Ann. 5:12-108 (West Supp. 1983), and requires that the hearings be transcribed, N.J. Stat. Ann. 5:12-107(a)(2) (West Supp. 1983), and that evidence be taken under oath. N.J. Stat. Ann. 5:12-107 (a)(3) (West Supp. 1983). The Act also requires that parties be afforded the right to call witnesses, produce documentary evidence, cross-examine opposing witnesses, impeach witnesses, produce rebuttal evidence, N.J. Stat. Ann. 5:12-107(a)(4) (West Supp. 1983), and enter into stipulations. N.J. Stat. Ann. 5:12-107(a)(7) (West Supp. 1983). There are provisions relating to judicial notice, N.J. Stat. Ann. 5:12-107(d) (West Supp. 1983), and rehearings on the basis of newly discovered evidence. N.J. Stat. Ann. 5:12-107(d) (West Supp. 1983). The Commission is granted the power to issue subpoenas, administer oaths, and serve its process in the manner provided in the rules of court, N.J. Stat. Ann. 5:12-65 (West Supp. 1983), and the right to grant testimonial immunity. N.J. Stat. Ann. 5:12-67 (West Supp. 1983). The Commission is also required, if it denies an application, to issue an order and a statement of reasons therefor, N.J. Stat. Ann. 5:12-94 (West Supp. 1983), and the right of

direct appeal to the New Jersey appellate courts is guaranteed. N.J. Stat. Ann. 5:12-110 (West Supp. 1983).

The Act guarantees the independence of the Commission members and staff through pre-employment restrictions, N.J. Stat. Ann. 5:12-58 (West Supp. 1983), post-employment restrictions, N.J. Stat. Ann. 5:12-60 (West Supp. 1983), and a variety of ethical constraints. N.J. Stat. Ann. 5:12-52(g)-59 and -62 (West Supp. 1983). The Act also has provisions assuring the separation of the Commission from the political process. N.J. Stat. Ann. 5:12-51 and -70(k) (West Supp. 1983). In short, the Commission functions very much in the manner of a court and its hearings are very much in the nature of trials.

This Court first dealt with *Younger* in the context of a trial-type administrative proceeding in *Geiger* v. *Jenkins*, 401 U.S. 985 (1971). There the Court summarily affirmed a District Court's dismissal of an action seeking to enjoin on constitutional grounds a license revocation hearing before a State Board of Medical Examiners.

In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), in which plaintiff sought to enjoin a license revocation hearing before a State Board of Optometry, this Court observed that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings. . . ." *Id.* at 576-577.

In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), plaintiff, whose unemployment compensation claim was pending before the state Board of Review, filed a federal suit challenging the state unemployment compensation statute on the ground that, *inter alia*, it was preempted by the federal statutory law. Before this Court, the state authorities did not seek a dismissal on the basis of *Younger*, and when that possibility was raised at oral argument they "resisted the suggestion." *Id.* at 479. This Court did not dismiss, noting that, when a state voluntarily submits to a federal forum, principles of comity

and federalism do not require federal courts to "force the case back into the State's own system." *Id.* at 481.[5]

However, the *Younger* abstention issue was raised in *Hodory* in one of the *amicus* briefs, and the Court chose to discuss it. The Court said that *Younger* "reflects 'a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.'" The Court added that *Younger* and its progeny are "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Id.* at 480-481.

In *Simopoulis* v. *Virginia State Board of Medicine*, 644 F. 2d 321, 326-327 (4 Cir. 1981), the Fourth Circuit commented that "[t]he term 'state tribunal' in *Hodory* was undoubtedly used advisedly and clearly would comprehend a state administrative proceeding, particularly if the decision of the state administrative agency were subject to appeal to the state courts under procedures permitting the assertion of constitutional claims."

In *Williams* v. *Red Bank Board of Education*, 662 F. 2d 1008, 1016 (3 Cir. 1981), the Third Circuit upheld a dismissal of a federal action by a teacher who was the subject of a pending tenure termination proceeding, stating:

> . . . the fact that the pending state proceeding is administrative rather than judicial should not by itself foreclose the application of the *Younger* doctrine. Administrative regulation often forms a crucial aspect of a state's implementation of its laws, and to bar *Younger* abstention simply on

[5] As previously noted, the extraordinary regulatory apparatus created to control the Atlantic City casino industry consists of two separate state agencies, the Commission and the Division. Although the Division now requests a determination by this Court of the preemption issue, the Commission, which is the state adjudicative agency whose process has been stayed by the federal courts, asserts that a dismissal on the bases of *Younger* is appropriate.

> the ground that the pending proceedings are 'administrative' could easily undermine important state policies and concerns. Such a result would not respect the Supreme Court's repeated admonitions that the more vital consideration underlying *Younger* is the notion of comity.

The Second Circuit has likewise stated that *Younger* is applicable to state administrative proceedings. *McCune* v. *Frank*, 521 F.2d 1152, 1157-1158 (2 Cir. 1975), and the federal district courts have applied *Younger* in a variety of administrative contexts. *See, e.g., McDonald* v. *Metro-North Commuter R.R. Div.*, 565 F.Supp. 37 (S.D.N.Y. 1983) (police disciplinary proceedings); *MacRea* v. *Motto*, 543 F.Supp. 1007 (S.D.N.Y. 1982) (firefighter disciplinary proceeding); *Holy Spirit Ass'n* v. *Town of New Castle*, 480 F. Supp. 1212 (S.D.N.Y. 1979) (zoning board hearing); *Rucker* v. *Wilson*, 475 F. Supp. 1164 (E.D. Mich. 1979) (medical board proceeding); *Rosko* v. *Pagano*, 466 F. Supp. 1364 (D.N.J. 1979) (police disciplinary proceeding); *Schachter* v. *Whalen*, 445 F. Supp. 1376 (S.D.N.Y. 1978), aff'd on other grounds, 581 F.2d 35 (2 Cir. 1978) (medical board hearing); *Lang* v. *Berger*, 427 F.Supp. 204 (S.D.N.Y. 1977) (medicaid disqualification hearing).

At least where, as here, an administrative tribunal is adjudicating matters of vital concern to the State, and affords the litigants the full panoply of due process rights, there is no reason for *Younger* to be any less applicable than it is where court proceedings are involved.

Another prerequisite for a *Younger* dismissal is that the state proceedings provide "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill, supra*, at 577. Local 54 clearly has an adequate state forum in which to raise its federal issues. Admittedly, the Commission refused to rule on the constitutionality of N.J. Stat. Ann. 5:12-86 and -93 (West Supp. 1983) when requested to do so by Local 54. Although the Commismission lacks the power as an administrative agency to rule on the facial constitutionality of its enabling statute, the state court system is fully competent to address such

issues. Pursuant to N.J. Ct. R. 2:5-6, Local 54 could have applied for leave to appeal from the Commission's interlocutory decision.

Moreover, Local 54 always had the right, upon the natural termination of the Commission's hearing, to a direct appeal to the New Jersey Superior Court, Appellate Division. *See,* N.J. Stat. Ann. 5:12-110(a) (West Supp. 1983), N.J. Ct. R. 2:2-3(a). As the District Court stated in *Williams* v. *Red Bank Board of Education,* 502 F. Supp. 1366, 1371 (D.N.J. 1980),

> . . . whether or not an administrative body can competently determine sensitive First Amendment issues, plaintiff's opportunity to raise her First Amendment claims in the state forum is adequate because she has an appeal as of right to the New Jersey Appellate Division which is a "forum competent to vindicate any constitutional objections".

In *Anonymous* v. *Association of the Bar of City of N.Y.,* 515 F.2d 427 (2 Cir. 1975), *cert.* den., 423 U.S. 863 (1975), the Court upheld the dismissal of an action seeking to enjoin an attorney disciplinary proceeding, noting that "[w]hatever constitutional questions are involved can certainly be raised in the state courts. . . ." *Id.* at 432.

Similarly, in *Rucker* v. *Wilson,* 475 F. Supp. 1164 (E.D. Mich. 1979), the District Court dismissed a federal suit instituted during the pendency of a hearing before the State Board of Medicine, stating that the available state appeal from the administrative determination provided "more than adequate protection for the constitutional rights involved." *Id.* at 1166.

Not only has Local 54 always had the right to raise its constitutional challenge to section 93 of the Casino Control Act in the New Jersey courts, it has in fact done so. After the hearing before the Commission terminated, Local 54 and Frank Gerace appealed to the New Jersey Appellate Division, and raised the same issues presented in the then pending appeal to the Third Circuit Court of Appeals. At the request of Local 54 and Gerace, the state appeal was dismissed without prejudice after the issuance of

the Third Circuit opinion. However, it is clear that the State has provided "a forum competent to vindicate any constitutional objections" which Local 54 seeks to raise, and therefore that federal court intervention is unwarranted. *Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 604.

Moreover, where, as here, the trial phase of the state proceedings has been completed, federal court intervention is particularly inappropriate, because it deprives the State of its legitimate function of providing appellate court review. The principles of comity and federalism which under *Younger* are ill-served when federal courts substitute themselves for state appellate courts. As this Court noted in *Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 608-609, such intervention is even more disruptive and offensive than pre-trial intervention by federal courts, and is "also a direct aspersion on the capabilities and good faith of state appellate courts."

The District Court declined to apply *Younger* abstention in the present case because, in its words, "the state proceedings have not been initiated by the state itself" (A91a). On appeal to the Court of Appeals, the Commission and Division argued that the proceedings against Local 54 clearly were initiated by the State, *i.e.,* by the Division of Gaming Enforcement, and that, in any event, the controlling consideration is the presence of an important state interest, not initiation by the State. *See, e.g., Middlesex County Ethics Committee* v. *State Bar Association, supra,* 457 U.S. at 423.

The Circuit Court also declined to apply *Younger* abstention, but did not mention the "state initiation" test utilized by the District Court. Thus, the Court apparently rejected the District Court's rationale. In its place, both the majority and dissenting opinions of the Circuit Court reasoned that the principles of *Younger* are not applicable here because Local 54 challenged the validity of the proceedings before the Commission. In the words of the majority:

> . . . when the issue tendered to the federal district court is the very power, as a matter of fed-

> eral law, to entertain a threatened proceeding, the principles of comity and federalism which apparently animate the *Younger* v. *Harris* rule are totally inapplicable. [A36a-A37a].

The dissent agreed, stating that, while "at first blush, this case appears to fall within the class of cases in which the district courts should abstain from adjudicating the claims at issue," abstention is nonetheless inapplicable here because:

> Where an individual who is subject to state proceedings to which the federal courts would otherwise defer raises a colorable claim that the proceedings themselves constitute a violation of a constitutional or statutory right, the principles of comity and federalism motivating *Younger* are superseded. [A42a, n.3].

In ruling that *Younger* is rendered inapplicable by the mere assertion that federal law protects against maintenance of a state proceeding, both the majority and the dissent overlooked the fact that *Younger* itself dealt with a First Amendment challenge to the state statute under which a criminal prosecution was being conducted. Nevertheless, this Court declared that the mere holding of the state proceeding did not constitute irreparable harm justifying equitable relief in federal court. *Younger* v. *Harris, supra*, 401 U.S. at 46, 48-49. In the present case the District Court specifically ruled that the holding of the hearing before the Commission would not constitute irreparable harm (A107a-A108a; A125a-A128a), and neither of the opinions in the Court of Appeals expressed any contrary conclusion. It is therefore unclear why the fact of a challenge to the legitimacy of state proceedings justifies federal court intervention in a case otherwise within the purview of *Younger*.

In fact, the *Younger* Court said that federal intervention in an ongoing state proceeding would not be justified by even irreparable injury, unless it was "both great and immediate." *Id.* at 46. The Court went on to conclude that only in cases where bad faith or harassment had been demonstrated would federal injunctive relief be called

for. *Id.* at 46-50. Local 54 is not claiming the proceeding against it was conducted in bad faith, but merely that it was conducted under an unconstitutional statute.

The *Younger* Court noted one situation in which irreparable harm could be shown even in the absence of bad faith or harassment, *i.e.*, where the statute under attack was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.* at 57, quoting *Watson* v. *Buck*, 313 U.S. 387, 402 (1941). The validity of section 93 is discussed a length in Point II of this brief. However, it is clear that section 93 does not fall within the above-quoted exception to *Younger*, and neither of the opinions of the Court of Appeals suggests that it does. Rather, the Court created a new exception, which renders *Younger* inapplicable whenever there is a colorable claim that the holding of a state proceeding offends a federal enactment.

In support of its conclusion, the majority below cited *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Ed.*, 654 F. 2d 868 (3 Cir. 1981), for the proposition that, "absent federal district court intervention, state agency orders which operate as prior restraints upon the exercise of federally protected rights may by virtue of the final judgment rule in 28 U.S.C. §1257 (1966), escape any federal appellate review for long periods" (A36a). The issue in the *New Jersey-Philadelphia Presbytery* case was the applicability of *Younger* to a federal suit instituted by persons who were not parties to an ongoing state action. The Court said that where such persons cannot intervene in the state action, and can only protect their interests in a separate action under 42 U.S.C. §1983 (1981), they might legitimately choose the federal forum because the Supreme Court can review interlocutory injunctive orders of lower federal courts but can only review final judgments of state courts. 654 F. 2d at 883-884.

The *New Jersey-Philadelphia Presbytery* opinion was issued over a vigorous dissent, which pointed out that

the majority misperceived the extent of Supreme Court appellate jurisdiction. 654 F. 2d at 904-905. At any rate, even the majority opinion in *New Jersey-Philadelphia Presbytery* did not suggest that *Younger* is inapplicable whenever it is claimed that an order of a state court or agency restrains the exercise of some federal right. In fact, *Younger* itself concerned a claim that the California Criminal Syndicalism Act, under which the state criminal prosecution there involved was instituted, inhibited the exercise of First Amendment rights, 401 U.S. at 784, and the *Younger* opinion does not even mention the possibility that such an allegation could provide a justification for a federal court to enjoin an ongoing state proceeding. To the contrary, *Younger* denounced the implicit denial of the equal ability of the state courts to order a fair and competent determination of federal issues which inheres in such an assertion.

As additional authority, the majority in the present case cited *In re Green's Petition*, 369 U.S. 689 (1962), and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), for the proposition that "the federal policy of preventing state courts from eroding rights guaranteed by section 7 is so important that as a matter of federal law a state court is without power to hold one in contempt for violating an order it had no power to enter" (App. A, 36a). These cases did involve rights under section 7 of the National Labor Relation Act, and did hold that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." *In re Green's Petition*, 369 U.S. at 694; *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. at 386, 399. However, this was a holding of general applicability and was not related to any particular significance granted section 7 rights. In addition, these cases come to this Court on *certiorari* from the highest courts of the states involved, and did not entail federal intervention in ongoing state proceedings.

Finally, the majority cited *Capitol Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954), and *NLRB* v. *Nash-Finch Co.*, 404

U.S. 138 (1971), for the proposition that "[e]ven pending state proceedings may be enjoined on preemption grounds" (App. A, 36a). Both of these cases involved attempts by the National Labor Relations Board to restrain enforcement of injunctions issued by state courts against peaceful picketing. In both cases the sole issue was whether the so-called Anti-Injunction Act, 28 U.S.C. §2283 (1978), precluded the granting of the requested relief. In neither case was abstention raised or discussed.

The majority of the Court of Appeals stated that the cases discussed above "suggest" that *Younger* is inapplicable where a federal plaintiff challenges the propriety of state proceedings (A36a-A37a). It is respectfully submitted that these cases do not support the conclusion reached by the Court, and that *Younger* itself clearly precludes that conclusion.

The dissent placed its reliance on cases involving claims of double jeopardy (A42a, n.3). For example, the dissent cited *Abney* v. *United States,* 431 U.S. 651 (1977), holding that a denial of a claim of double jeopardy is an appealable collateral order, and *United States ex rel. Webb* v. *Court of Common Pleas,* 516 F.2d 1034, 1037 (3 Cir. 1975), holding that pretrial *habeas corpus* relief is available to a defendant who seeks to avoid trial on the ground of double jeopardy and whose double jeopardy claims have been denied by the state's highest court. These cases, and the others cited by the dissent, are grounded on the notion that the prohibition of double prosecution for a single offense is intended to spare defendants the embarrassment, expense and ordeal of a second trial. *Abney,* 431 U.S. at 661-662; *Webb,* 516 F.2d at 1040-1041. In *Younger* the Court, in discussing the showing of irreparable harm which is necessary to justify federal injunctive relief against an ongoing state proceeding, stated:

> Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected right must

> be one that cannot be eliminated by his defense against a single criminal prosecution. [401 U.S. at 46].

The cases cited by the dissent present a unique situation in which a trial itself constitutes an injury against which a defendant is afforded federal constitutional protection, as contrasted with the *Younger* case, and the present case, in which the holding of the single state proceeding does not constitute an irreparable injury. The cases cited by the dissent clearly do not support the conclusion that a plaintiff is entitled to federal relief whenever there is a colorable allegation that some federal constitutional or statutory right entitles him to avoid participating in a single state proceeding.

In summary, it is respectfully submitted that both the majority and dissenting opinions have announced a novel, ill-conceived, and unsupported exception to the *Younger* rule. If this exception is allowed to stand, and federal plaintiffs can avoid the impact of *Younger* merely by alleging that they should not be subjected to state proceedings, the principles of comity and federalism underlying the *Younger* abstention doctrine will be rendered meaningless. The Commission therefore urges this Court to remand to the District Court for entry of an order dismissing the complaint in this matter.

II. The ruling below, that New Jersey is powerless to prevent the subversion of its casino industry through criminal infiltration of the industry's labor organizations is based on a misapprehension of the doctrine of federal preemption.

The substantive issue in this case is whether section 93 of the New Jersey Casino Control Act, which seeks to prevent corruption of the Atlantic City casino industry by imposing certain disqualification standards on officials of labor unions operating within that industry, so offends national labor policy as to be invalid under the Supremacy Clause, U.S. Const., Art. VI, cl. 2.

The majority of the Court of Appeals held that section 93 is preempted by section 7 of the National Labor Relations Act, 29 U.S.C. §157 (1983), (A31a).[6] According to the majority, section 93, by empowering the Commission to disqualify casino industry union officials, and to prohibit dues collection if the disqualified officials continue to serve, impermissibly intrudes on the absolute and unqualified section 7 right of employees to "bargain collectively through representatives of their own choosing." The dissent concluded that section 7 rights are not absolute, that section 93 does not offend national labor policy, and that the two enactments can peacefully coexist.

Analysis of the preemption issue must begin with this Court's decision in *Hill* v. *Florida*, 325 U.S. 538 (1945). *Hill* involved a Florida statute which required, in section 4, that union "business agents" obtain a state license. A license could be denied to any applicant who had not been a citizen of the United States for ten years, had been convicted of a felony, or was not of "good moral character." The statute also required, in section 6, that unions pay a $1.00 registration fee and file an annual report with the Secretary of State of Florida. Violation of section 4 or 6 was punishable as a misdemeanor.

Hill was a business agent within the meaning of the Florida statute, but he had not applied for a license as

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[6] The Court of Appeals also held that the section 93 remedy relating to pension and welfare fund administration is preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381 (1975). However, this issue need not have been addressed by the Court of Appeals and need not be addressed by this Court, because the pension and welfare fund remedy was not invoked by the Commission in this case. If this Court does reach the issue, the Commission adopts the arguments advanced by co-appellants Division of Gaming Enforcement, *et al.*, in support of the validity of this portion of the statute. However, the Commission also notes that, in view of the broadly-framed severability clause of the New Jersey Casino Control Act, N.J. Stat. Ann. 5:12-133(a) (West Supp. 1983), it is clear that this remedy, should it ultimately be found unconstitutional, could be severed without altering the character or purpose of Section 93.

required by section 4, nor had his union registered as required by section 6. The Florida courts enjoined Hill from acting as a business agent until he obtained a license and enjoined his union from functioning as such until it registered.

This Court reversed, finding the statute preempted by section 7 of the NLRA. The Court indicated that the filing and registration provisions of the Florida statute were valid, but that the criminal and injunctive sanctions had the effect of denying Florida trade union members the federally guaranteed "full freedom" to select bargaining representatives of their own choosing. *Id.* at 541-543.

The majority opinion in the present case found *Hill* controlling (A31a).[7] However, as the dissent recognized, in view of the distinctions between section 93 of the Casino Control Act and the statute invalidated in *Hill,* and the development of federal statutory and case law since *Hill,* section 93 cannot be so easily cast aside.

Hill involved an attempt to regulate *all* labor unions in Florida. Section 93 only affects unions in a unique, local industry, which operates in a single municipality. The Florida statute imposed broad licensing standards, including "good moral character," whereas section 93 refers only to particular facts or circumstances and places the burden on the State to demonstrate their existence. The statute struck down in *Hill* was not grounded in any historically-explained and deeply-felt local concern, but was merely an attempt to erect a state regulatory system over labor unions. Section 93 was enacted as part of an overall regulatory system designed to address New Jersey's deeply-rooted interest in protecting its fledgling casino industry from criminal infiltration. New Jersey is not at-

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[7] In fact, the majority read *Hill* as compelling the conclusion that section 93 is invalid in its entirety, and went so far as to describe the hearing before the Commission as an "illegal proceeding" (A34a). As Judge Becker pointed out, even if the case is read as invalidating the sanction provisions of section 93, "*Hill* simply cannot be construed as affecting the validity of the non-sanction provisions" (A52a, n.5).

tempting to regulate labor unions; it is attempting to regulate casinos, and it is attempting to do so without conflicting with legitimate collective bargaining rights. Thus, *Hill* is factually inapposite.

With respect to legal developments subsequent to *Hill*, in 1959 Congress enacted the Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§401-530 (1976). Section 504(a) of the LMRDA prohibits individuals convicted of certain felonies from holding union office for five years thereafter. Congress imposed these disqualification criteria largely because state and local authorities had failed to adopt "effective measures to stamp out crime and corruption [in unions] and to guaranty internal union democracy. . . ." *Sen. Rep. No. 187, 86th Cong., 1 Sess.*, April 14, 1959, p. 6; *U.S. Code Cong. & Admin. News*, p. 2322 (1959), quoted in *Intern. Longshoremen's etc.* v. *Waterfront Comm'n, etc.*, 495 F. Supp. 1101, 1123 (S.D. N.Y. 1980), aff'd in part and rev. in part on other grounds, 642 F. 2d 666 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981).

That the section 504(a) disqualification criteria were not intended to preclude state enactments in the area is made clear by section 603(a) of the LMRDA, 29 U.S.C. §603(a) (1975), which provides that "nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward or other representative of a labor organization . . . under the laws of any State." Although the majority in the present case said that section 603(a) only applies to state law remedies for breach of fiduciary duties by union officials (A24a-A27a), the dissent pointed out that there is no support for such a restrictive reading in the legislative history (A57a-A58a). Moreover, in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), Justice Frankfurter's plurality opinion, in which Justice Brennan concurred, declared that, in light of section 603(a), "no inference could possibly arise that [a New York statute imposing broader disqualification criteria] is implicitly preempted by section 504(a)." *Id.* at 157. *Accord, Intern. Longshoremen's Ass'n* v. *Waterfront*

Com'n, 85 N.J. 606, 613, 428 A.2d 1283, 1287 (Sup. Ct. 1981).

Thus, as of 1959 the "full freedom" of employees to elect bargaining representatives was no longer absolute, Congress having imposed limits in section 504(a) of the LMRDA and having expressly refused to preempt the the states from taking action to the same effect.[8]

In *DeVeau* v. *Braisted, supra,* this Court upheld, against a preemption challenge, section 8 of the New York Waterfront Commission Act, Title 29, N.Y. Unconsol. Laws, §9933 (McKinney, 1974), which provides that no person shall collect dues on behalf of a waterfront union if any officer or agent of the union has been convicted of a felony and has not been pardoned or granted a "certificate of good conduct" from a parole board.

Section 8 of the Waterfront Commission Act is, if anything, broader in scope than sections 93 and 86 of the Casino Control Act. Unlike the New Jersey statutes at issue here, section 8 does not allow waiver of a disqualification or place any temporal limits on a disability. *Compare,* N.J. Stat. Ann. 5:12-86(c)(4) (West Supp. 1983).

Justice Frankfurter (plurality opinion), noted that under section 8 of the Waterfront Commission Act, waterfront employees do not have complete freedom of choice in selecting bargaining representatives, because the choice of a convicted felon would cause the union to be disabled from collecting dues. *Id.* at 152. However, Justice Frankfurter added that section 8 did not conflict with or seriously impede section 7 of the NLRA, and that

> [t]he fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of fed-

[8] It should also be noted that in 1978 Congress decreed that any labor union seeking to represent employees of the federal government must be "free from corrupt influences or influences opposed to basic democratic principles," and imposed substantial registration and filing requirements on such unions. Pub. L. No. 95-454, 5 U.S.C. §7120 (1978).

> eral and state interests and of the interaction of federal and state powers. [*Id.* at 152].

Justice Frankfurter continued:

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [*Id.* at 153]

Upon examining the legislative record preceding the enactment of section 8, Justice Frankfurter concluded that the statute vindicated "a legitimate, compelling state interest, namely, the interest in combating local crime infesting a particular industry." *Id.* at 154-155. Balancing the substantial local concern against the incidental infringement of the freedom of workers to elect representatives, the Court concluded that section 8 was not preempted by section 7 of the NLRA.

While *DeVeau* rejected an inflexible approach to section 7 preemption issues in favor of a balancing of the competing interests, in the present case the majority of the Circuit Court ruled that, because section 93 infringes upon the right of employees to elect representatives of their own choosing, it is "absolute[ly]" preempted and there is "neither occasion nor justification for engaging in weighing or balancing" of the state and federal interests involved (A27a-A28a). Thus, the majority did exactly what Justice Frankfurter cautioned against, *i.e.*, misconceived the doctrine of preemption by "decid[ing] this case mechanically on an absolute concept of free

choice," and declined to face the despositive question of whether Congress would consider section 93 "a true, real frustration" of national labor policy. *DeVeau* v. *Braisted, supra* at 153.

According to the majority below, *DeVeau* carries no force as precedent because it turned on congressional approval of a bi-state compact, and because Justice Frankfurter wrote only for a plurality. Both reasons are invalid.

The bi-state compact involved in *DeVeau* was an agreement between New York and New Jersey to jointly regulate their common waterfront. As required by Art. I, cl. 10, of the Constitution, the compact was submitted to Congress, and it was approved. Section 8 of the Waterfront Act was not part of the bi-state compact, but was part of the New York implementing legislation. The New Jersey implementing legislation contained an identical provision. N.J. Stat. Ann. 32:23-80 (1963). Both states had enacted the implementing legislation prior to the approval of the compact by Congress. However, as Justice Frankfurter explained, in approving the compact

> Congress was fully mindful of the specific provisions of §8. Not only had §8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International Longshoremens Association, as a ground of opposition to Congressional consent, that approval of the compact by Congress would carry with it sanction of §8. [Citations omitted.] The ground of objection to the section which is appellant's primary reliance here, namely, that it conflicts with existing federal labor policy, was urged as a ground for rejection of the compact. [*Id.* at 151.]

In light of this legislative background, Congress took the unprecedented step of expressly consenting to the implementing legislation, although it was not part of the compact. *Id.* at 151; 154. Thus, Congress expressed its view that section 8 is compatible with federal labor policy.

Congress did not amend or modify existing labor law, since the compact itself stated:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any way individually, collectively, and through labor organizations or other representatives of their own choosing. . . .

N.J. Stat. Ann. 32:23-68 (1963); Title 29, N.Y. Unconsol. Laws, §9868 (McKinney, 1974). Thus, the compact embodied provisions identical to section 7 of the NLRA. *See, Local 824* v. *Waterfront Com'n.*, 16 Misc. 2d 632, 182 N.Y.S. 2d 481, 484 (Sup. Ct. 1958), aff'd, 7 A.D.2d 630, 179 N.Y.S. 2d 843 (App. Div. 1958), app. dism., 6 N.Y. 2d 861, 188 N.Y.S. 2d 562, 160 N.E. 2d 93 (Ct. App. 1959), *cert.* den., 361 U.S. 835 (1959). Necessarily, then, Congress approved a compact which by its terms embodies and protects the statutory right of employees to bargain collectively through representatives of their own choosing, and at the same time expressly consented to implementing legislation precluding convicted felons from serving as labor union officials. The only conclusion to be drawn is that Congress did not view the section 8 limitations as an infringement of rights embodied in section 7 of the NLRA.

As Justice Frankfurter explained, Congressional approval of the bi-state compact and the implementing legislation relieved the Court of the task of having to "imaginatively summon the likely reaction of Congress to the state legislation." *Id.* at 153. He concluded that, in view of Congress's clear statement on the subject, "it would offend reason to attribute to Congress a purpose to pre-empt the state regulation contained in §8." *Id.* at 154-55.[9]

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[9] Clearly, this was the correct understanding of the compact, for

(Footnote continued on following page)

Thus, *DeVeau* did not pivot on the existence of the compact. Rather, the plurality opinion makes clear that a reconciliation of interests is mandated, but that the search for Congressional intent is paramount. The compact merely provided an extraordinary opportunity for Congress to directly express its view on the implementing legislation. In short, *DeVeau* is not a bi-state compact case and cannot be discarded on that basis. As Judge Becker stated:

> "Justice Frankfurter's formulation strongly implies that a Court without access to similarly conclusive extrinsic evidence nevertheless should attempt to determine whether Congress would have intended to preclude the particular state legislation at issue." [A61a].

As noted, the majority also saw no precedential value in *DeVeau* because Justice Frankfurter's opinion was only a purality opinion. The majority said that Justice Brennan, who concurred in the ruling that section 8 was not preempted, "made it clear that he relied on Congressional intent in approving the compact" (A29a). On the contrary, Justice Brennan considered the state interests behind section 8, and said that he "believe[d] that New York's disqualification of ex-felons from waterfront union offices, on all of the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate aim. . . ." *Id.* at 160-161.

In summary, *DeVeau* clearly stands for the proposition that, in addressing a deeply-rooted and legitimate local interest, a state may impose disqualification criteria broader than those in section 504(a) of the LMRDA.

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. . . the requirement that Congress approve a compact is to obtain its political judgment: *Is the agreement likely to interfere with federal activity in the area,* is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation? [*Cuyler* v. *Adams*, 449 U.S. 433, 441, n.8 (1981), quoting *United States Steel Corp.* v. *Multistate, Tax Com'n.*, 434 U.S. 452, 485 (1978), White, J. dissenting; emphasis added].

However, the *DeVeau* Court also stated that it was not overruling *Hill* v. *Florida, see,* 363 U.S. at 152, which, of course, was predicated on the "full freedom" of employees to elect representatives of their own choosing. Certainly, it cannot be contended that section 8 of the Waterfront Commission Act, or section 93 of the Casino Control Act, do not in some measure limit the full freedom of certain employees to elect representatives. It thus must be concluded that *DeVeau* does to some extent modify *Hill.* It is likewise clear that section 504(a) of the LMRDA limits "full freedom" and therefore modifies the *Hill* rule.

While the Commission is not asking this Court to overrule *Hill,* it is asking the Court to recognize that the *Hill* doctrine of "full freedom" is not absolute, and that, in light of *DeVeau* and 504(a), the doctrine admits of an exception in cases where a historically-explained, deeply-felt local concern has been addressed by the imposition of certain limited disqualification criteria on trade union officials.[10] Moreover, recognition of such an exception to the notion of "full freedom" would not, in fact, call upon this Court to do anything other than to treat this case in accordance with its own established and often repeated guidelines for dealing with NLRA preemption issues.

Throughout the existence of the NLRA, Congress has refrained from giving direction as to its in-

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[10] Although the majority below stated that the Commission and Division contended that *DeVeau* overruled *Hill* (A28a), the dissent correctly pointed out that no such argument was made (A63a, n.14). The continuing validity of *Hill* has been questioned, *Fitzgerald* v. *Catherwood,* 388 F.2d 400, 460 (2 Cir. 1968), *cert. den.,* 391 U.S. 934 (1969), but the Commission has never contended that the case has been overruled and does not now contend that it should be overruled. Rather, the Commission believes that the result in *Hill* might well be the same today, even under the balancing principles espoused by this Court in more recent preemption cases. However, it is the sweeping and absolute language of the *Hill* decision which must be delimited to permit the appropriate competing-interest analysis.

tended preemptive effect, and thus left the issue of preemption to the courts. *Farmer* v. *Carpenters Local 25*, 430 U.S. 290, 296 (1977), *Gorman, Basic Text on Labor Law Unionization and Collective Bargaining*, 776 (1976). As the Court stated in *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 488 (1953), the NLRA "leaves much to the states, although Congress has refrained from telling us how much."

Faced with Congressional silence, this Court has developed a preemption doctrine based primarily on two competing considerations—the need for uniform national labor regulation under the NLRA, and the recognition that state regulation of activity which is merely a peripheral concern of the NLRA, or which touches interests deeply rooted in local feeling and responsibility, must be allowed to stand. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 233-244 (1959); *Farmer* v. *Carpenters Local 25, supra* at 295-296; *Belknap* v. *Hale*, —— U.S. ——, 103 S.Ct. 3172, 3177 (1983). The ultimate objective is to discover Congressional intent, a frequently difficult task which can only be undertaken on a case by case basis. For this reason, the Court has refused to declare state regulation preempted solely because it involves labor policy in some way. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).

Recently, in *Local 926, Inter. Union of Oper. Eng.* v. *Jones*, —— U.S. ——, 103 S. Ct. 1453, 1458-1459 (1983) the Court reiterated its approach to NLRA preemption issues as follows:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA. *Garmon, supra*, 359 U.S., at 245, 79 S. Ct., at 779; [other citations omitted]. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion", *Sears, Roebuck & Co.* v. *Carpenters*, [436 U.S. 180] at 188, 98 S. Ct., [1745] at 1752 [(1978)], if the conduct at issue is arguably prohibited or pro-

> tected otherwise applicable state law and procedures are ordinarily preempted. *Farmer, supra,* 430 U.S., at 296, 97 S. Ct., at 1061. When, however, the conduct at issue is only a peripheral concern of the Act or touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct. *Garmon, supra,* 359 U.S., at 243-244, 79 S. Ct., at 778.

In the present case the majority of the Court of Appeals misapprehended the *Garmon* rule, and established its own rule of absolute preemption where a state regulation in any way implicates or restricts activity protected by section 7. In order to justify this rule, the majority restricted the *Garmon* balancing approach to cases where the State seeks to regulate conduct which is not protected by section 7, "but is nevertheless federally regulated" (A27a).

Garmon does not establish two preemption doctrines, one absolute and one relative. *Local 926* clarifies that *Garmon* establishes a single rule under which state regulation of matters actually or arguably within the purview of the NLRA is ordinarily, but not necessarily preempted. As explained in *Farmer* v. *Carpenters Local 25, supra,* 430 U.S. at 296-297:

> . . . the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we would not infer that Congress had deprived the States of the power to act." *Garmon* at 243-244.
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> . . . These exceptions "in no way undermine the vitality of the pre-emption rule." [*Vaca* v. *Sipes*]

> 386 U.S. [171] at 189 [(1967)]. To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.

As this Court further explained in *Local 926, supra,* 103 S.Ct. at 1458:

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the importance of the asserted cause of action to the state as a protection to its citizens. See *Sears, supra,* 436 U.S., at 188-89, 98 S. Ct., at 1752; *Farmer, supra,* 430 U.S., at 297, 97 S. Ct., at 1061.

The respect for state enactments demonstrated in *Garmon, DeVeau* and the other cases cited herein is by no means unique to NLRA preemption issues. This Court has consistently held that the "existence of federal supremacy is not lightly to be presumed," *New York State Dep't of Social Serv.* v. *Dublino,* 413 U.S. 405, 413 (1973), and, indeed, is not favored in the absence of a persuasive showing that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311 (1981). Nor is there any basis to conclude, as the majority below seems to have done, that section 7 rights have somehow acquired a status which places them outside of the normal preemption analysis. The *Garmon* balancing approach clearly establishes that this is not the case.[11] When

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[11] In *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum.,* 445 U.S. 97 (1980), the Court was faced with a conflict between the Sherman Act, 15 U.S.C. §1 *et seq.,* which it described as "the Magna Carta of free enterprise," *id.* at 111, and California's wine pricing statute. The Court ruled that it was required to "harmo-

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the required balancing of the federal and state interests involved in the present case is performed, the result must be similar to that reached by the Court in *DeVeau,* and the same as that espoused by the dissent in the Court of Appeals, *i.e.,* that section 93 is not preempted by section 7 of the NLRA.

As Judge Becker concluded, it is beyond dispute that the concerns of New Jersey's Legislature and citizenry embodied in section 93 "cannot be characterized as anything less than 'deeply rooted in a local feeling and responsibility'" (A64a; A72a). The District Judge had reached the same conclusion in his opinion (A106a). Indeed, this conclusion is manifest in light of the history and purpose of section 93.

Section 93 is one part, albeit an important part, of New Jersey's effort to control gaming and harness its economic potential for the public welfare. Gambling itself is distinctively a state problem that is to be governed, controlled, and regulated by the individual states. *State* v. *Rosenthal,* 93 Nev. 36, 559 P. 2d 830, 836 (Sup. Ct. 1977), appeal dism., 434 U.S. 803 (1977). For its part, the federal government has traditionally refrained from interferring with the freedom of the states to determine their own gambling policies. Congress has generally protected the autonomy of the states, by exempting state-legalized gambling from the application of the federal criminal laws. In fact, Congress has justified its actions as designed to assist the states in the enforcement of their gambling laws. *See, Final Report*

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nize state and federal powers," *id.* at 110, and to reconcile the "competing state and federal interests" involved. *Id.* at 111. Thus, in dealing with anti-trust statutes, which are certainly as central to our economic and political system as federal labor laws, this Court has balanced competing local and national interests, and has been reluctant to cast aside state enactments which are intended to control an industry posing unusual regulatory difficulties and potential harm to the State and its residents.

of Commission on the Review of the National Policy Toward Gambling (1976), at 9, 11.[12]

In New Jersey gambling was long prohibited by the State Constitution. *See,* N.J. Const. of 1844, Art 4, §7, par. 2 (as amended 1897). In 1939 the Constitution was amended to allow pari-mutuel wagering in horse races at legalized tracks. In 1947 New Jersey adopted a new Constitution, which, in Art. 4, §7, par. 2, prohibited all gambling, except for bingo games, lotto games and raffles held by certain charities, unless approved by the citizens in a general election.

In 1974 the voters of New Jersey rejected a referendum to allow legalized casino gambling throughout the State. In 1976 they approved a referendum to permit casinos only in Atlantic City, and thereby authorized adoption of the Casino Control Act. However, they did so only after they were promised that New Jersey would have the "strongest regulation of casinos in the world." *See, e.g., Strongest Law in World Offered for Atlantic City Casinos,* N.Y. Daily News, Oct. 1, 1976, at 40; *Lawmakers Reveal Casino Guidelines,* Newark Star Ledger, Oct. 1, 1976, at 1 (A66a).

Public hearings on the drafting of the Casino Control Act were held and numerous interested parties offered comments. *See, Public Hearing before the Assembly, State Government, Federal and Interstate Relations Committee of New Jersey Legislature on Assembly Bill No. 2366* (December 1976); *Public Hearing before the Senate Ju-*

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[12] Federal law imposes no general prohibition of gambling, although Congress has enacted legislation regulating certain interstate aspects of gambling, *see, e.g.,* 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); 18 U.S.C. §1084 (1976) (barring transmission of wagering information over interstate wires); 18 U.S.C. §§1301-1307 (1976 and Supp. V 1981) (regulating lotteries); 18 U.S.C. §1953 (1976 and Supp. V 1981) (barring interstate shipment of gambling paraphernalia). (A65a, n.15). However, these laws are designed to aid the states in the suppression of gambling activity which is contrary to state policy. *United States* v. *Fabrizio,* 385 U.S. 263 (1966).

diciary Committee of the New Jersey Legislature on Senate Bill No. 1780 (March 2, 1977). Reports were also submitted to the Governor and Legislature by various law enforcement entities. *See, Second Interim Report of the State Policy Group on Casino Gambling* (February 17, 1977); *Report and Recommendation on Casino Gambling by the Commission of Investigation of the State of New Jersey* (April 1977).[13]

The system of statutory and administrative controls which emerged has been described by the New Jersey Supreme Court as "extraordinarily pervasive and intensive," *Knight* v. *City of Margate,* 86 N.J. 374, 381, 431 A.2d 833, 836 (Sup. Ct. 1981), and as designed to regulate all aspects of the casino industry with the "utmost strictness." *Id.,* 86 N.J. at 392, 431 A.2d at 842; *Bally Manufacturing Corp.* v. *N.J. Casino Control Commission,* 85 N.J. 325, 426 A.2d 1000 (1981), appeal dism., 454 U.S. 804 (1981); *In re Martin, et al.,* 90 N.J. 295, 447 A.2d 1290 (Sup. Ct. 1982), *Uston* v. *Resorts International Hotel, Inc.,* 89 N.J. 163, 445 A.2d 370 (Sup. Ct. 1982).

When the Legislature promulgated the Casino Control Act it emphasized two principal points. First, the purposes of initiating casino gaming were: to enhance the tourist, resort, recreational and convention industry of the State; to restore, rehabilitate and redevelop Atlantic City; and to contribute generally to the economic structure, general welfare, health and prosperity of New Jersey. N.J. Stat. Ann. 5:12-1(b)(1)-(17) (West Supp. 1983).

Second, and more fundamentally, casinos, no matter how great their rewards, would only be acceptable if they were stringently regulated to preclude criminal infiltration or influence. Thus, the Casino Control Act demands maintenance of "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." N.J. Stat. Ann. 5:12-1(b)(6) (West Supp. 1983). Directly related to this purpose is the legislative declaration that "the regulatory provisions . . . are designed

[13] These reports are part of the record in the District Court, which has been forwarded to this Court.

to extend strict State regulation to all persons . . . practices and associates related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Ibid.*

Hence, it is the expressed policy of the State of New Jersey to regulate and control all aspects of the casino industry with the "utmost strictness" to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. *Knight* v. *City of Margate, supra,* 86 N.J. at 392, 431 A.2d at 842. Obviously, the implementation of this public policy would be seriously deficient if it failed to extend to those labor unions which represent or seek to represent employees of the nine casino hotel facilities in Atlantic City.

Local 54 has asserted in the courts below that there has never been any finding that the Atlantic City casino industry is overwhelmed with corruption and crime. Aside from the fact that the casino industry is in its infancy and it is thus impossible for there to have been such a finding, it has long been recognized that legalized gaming is not only potentially harmful to the public but extremely sensitive and vulnerable to improper influence. *Niglio* v. *New Jersey Racing Commission,* 158 N.J. Super. 182, 188, 385 A.2d 925, 928 (App. Div. 1978); *see also,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, *The Development of the Law of Gambling: 1776-1976* (1977). The Federal Bureau of Investigation has long maintained that gambling is the "lifeblood of organized crime." *See,* Testimony of Frederich Fehl, Acting Asst. Dir., FBI, before the *Commission on the Review of the National Policy Toward Gambling,* Hearings in Washington, D.C., May 10, 1976 (App. A, 65a).

Casino gaming is unusually attractive to infiltration by organized crime, for two reasons:

> First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which

> are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are.

Santaniello, *Casino Gambling: The Elements of Effective Control,* 6 Seton Hall Legis. J. 23, 32 (1982) (footnote omitted).

Prior to the enactment of the Casino Control Act, the New Jersey State Commission of Investigation specifically advised the Governor and members of the Legislature that the nature of the casino industry made it a "vulnerable target for criminal intrusion." *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra,* at p. III. The Commission of Investigation emphasized that only the "most stringent of gambling control laws can thwart the infiltration of casino and related services and suppliers by organized crime." *Id.* at p. II.

Significantly, the Commission of Investigation noted that its experience regarding organized crime strongly suggested that there were:

> few better vehicles utilized by organized crime to gain a stranglehold on the entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover, the ready source of cash which union coffers provide can be employed as financing of all sorts of illegitimate or illicit ventures.

Repori and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra at 1-H.

Casinos are permitted in Atlantic City only in hotels with at least 500 sleeping rooms. N.J. Stat. Ann. 5:12-27

(West Supp. 1983). Investments of hundreds of millions of dollars are necessary to construct such hotels. Thus casino hotels, in addition to having the potential to generate hugh income, also operate under tremendous debt burdens. In addition, the casino business, within Atlantic City and among casino jurisdictions, is fiercely competitive. A labor union, such as Local 54, has the ability to bring a casino hotel, or all Atlantic City casino hotels, to a halt, or to threaten to do so. The potential for such a union to exact tribute, in dollars or in influence, in exchange for labor peace is obvious[14].

Accordingly, the State Commission of Investigation recommended taking steps to insure the integrity of labor unions affiliated with Atlantic City casino hotel facilities, *Report and Recommendations on Casino Gambling by the Commission of Investigation of the State of New Jersey, supra* at 1-H and 2-H, as did the Governor's Staff Policy Group, *Second Interim Report of the Governor's Staff Policy Group on Casino Gaming, supra* at 46. It is not surprising that the New Jersey Legislature heeded their advice. Regulation of the casino industry, which has traditionally been prohibited throughout the United States, and which has long been a magnet to organized crime, could hardly be expected to succeed if it ignored the industry's labor unions. Indeed, in enacting the Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 941, 18 U.S.C.A. §1961 *et seq.* (West Supp. 1981), in 1970

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[14] In recent testimony before the Senate Permanent Subcommittee on Investigations, the New Jersey Attorney General stated:

> Organized labor is in a prime position to exert tremendous pressure over the casino industry. . . . What would a casino owner pay for labor peace? How much is it worth to keep a business that grosses between $500,000 and $1 million a day free of a strike? A corrupt union could extort outright payments or use its power of persuasion to dictate what firms get the lucrative ancillary service contracts within the casino industry.

Quoted in *Court Delay Seen in Casino Dispute,* N.Y. Times, Oct. 10, 1982, at 55, col.1.

Congress also recognized the explosiveness of the combination of labor racketeering and gambling.[15]

In his dissent Judge Becker recognized that, unlike the New York-New Jersey waterfront, the Atlantic City casino industry has not been found to be overrun with crime and corruption, and responded:

> But to write into preemption jurisprudence a distinction between remedial and prophylactic legislation would prevent states from acting until an industry is so rife with corruption that "criminals, racketeers, and hoodlums [have] acquired a stranglehold," *Hazelton* v. *Murray*, 21 N.J. 115, 120, 121 A.2d 1, 4 (1956) (Brennan, J.) (describing condition of New York/New Jersey waterfront prior to compact and sustaining constitutionality of provision of New Jersey law identical to provision sustained in *DeVeau*). The inefficiency of such a distinction is manifest; to say that federal labor policy requires it would offend reason. [A74a-A75a].

Surely, the Supremacy Clause does not require New Jersey to wait until it worst fears are realized before it can act.

Local 54 contended in the courts below that there is no need for section 93 to apply to it, because its members are not directly involved in gaming operations, *i.e.*, they are not blackjack dealers, pit bosses, casino managers, *etc.* However, all of Local 54's members who work for casino hotels come within the licensure or registration provisions of the Casino Control Act, and are thus subject to the Commission's jurisdiction and the disqualification criteria

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[15] The recent decision of the National Labor Relations Board in *Marina Associates* v. *Casino Police and Security Officers, Local 2*, 267 N.L.R.B. No. 163 (1983), illustrates the problem of organized crime infiltration of the casino industry through labor organizations. Local 2 petitioned for certification as exclusive collective bargaining representative for the security guards at a Nevada casino. The Board upheld the ruling of the Regional Director, who dismissed the petition on the ground that Local 2 was not a labor organization within the meaning of section 2(5) of the NLRA, 29 U.S.C. §152(5) (1973), but rather was an organization operated by certain underworld figures for their personal profit.

of section 86 of the Act. N.J. Stat. Ann. 5:12-86 (West Supp. 1983). Moreover, Local 54 is the largest union operating in the Atlantic City casino industry, and its leaders wield a degree of influence which cannot be measured by the job specifications of its members. The dangers which section 93 is designed to protect against are clearly presented by Local 54.

Local 54 has also pointed out that some of its members work outside of the casino industry. Obviously, New Jersey has no interest in extending its system of casino regulation to persons who are not involved in the industry, and the section 93 prohibition of dues collection applies only to workers who are required to be licensed or registered under the Casino Control Act. In any event, the fact that the union's membership includes persons who do not work in casino hotels does not lessen the need to insure that it is not controlled by criminal elements. The danger to the casino industry remains present and it cannot be effectively negated if the State is unable to challenge the unfit leaders of the union because not every member is employed in a casino hotel.

Section 93 is an essential and integral part of New Jersey's overall effort to regulate its casino industry, and the policies embodied in section 93 cannot be characterized as anything less than deeply rooted in local feeling and responsibility. As Judge Becker put it (A72a),

> In sum, New Jersey's comprehensive regulation of the casino industry is a matter of intense and extraordinary local interest. Such regulation is not only essential to the State's struggle to maintain the integrity of the industry, but the very prospect of such comprehensive legislation was the basis upon which New Jersey's citizens consented to casino gambling in the first place. Given the unique nature of the industry—in particular its tremendous, unmonitored cash flow and its consequent attractiveness to racketeers and organized crime—the concerns of the legislature and citizenry cannot be characterized as anything less than "deeply rooted in local feeling and responsibility." *Local 926* v. *Jones*, supra, 103 S. Ct. at 1459.

Had the majority of the Court of Appeals considered the issue, surely it would have reached the same conclusion.

It is equally clear that section 93 does not represent a disruption of federal labor policy. Section 93 applies to a single, unique, local industry. In addition, as the Court ruled in *DeVeau* v. *Braisted, supra,* 363 U.S. 144, with respect to section 8 of the Waterfront Commission Act, section 93 does not contradict any federal labor enactment and can operate in harmony with federal labor policy. Like section 8 of the Waterfront Commission Act, section 93 does not deprive workers of the right to choose bargaining representatives, but merely restricts their right to choose insofar as necessary to protect the sensitive and vulnerable casino industry from pressure or control by convicted criminals and persons who conduct union affairs under the influence of organized crime. *Cf. DeVeau* v. *Braisted, supra,* 363 U.S. at 152. With respect to the disqualified individuals, section 93, again like section 8 of the Waterfront Commission Act, does not prevent them from serving in non-casino unions in Atlantic City, or in any unions outside of Atlantic City. It merely prevents corrupt union leaders from corrupting or feeding upon Atlantic City casinos. *Cf., International Longshoremen's Assoc.* v. *Waterfront Commission,* 642 F.2d 666, 672 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981).

The majority below correctly noted that the National Labor Relations Board has asserted jurisdiction over the casino industry (A34a-A35a). *El Dorado, Inc.,* 151 N.L.R.B. 579 (1965). However, as Judge Becker explained (A75a-A76a, n.26), the majority's implication that the NLRB's assertion of jurisdiction cannot be reconciled with state regulation under section 93 is incorrect, in view of the fact that the NLRB continues to exercise jurisdiction over the New York Waterfront despite the continuing validity of section 8 of the Waterfront Commission Act.

In addition, as Judge Becker also noted (A76a, n.26), the NLRB has shown a marked sensitivity to the fact that gambling activities are subject to strict state regulation, and a willingness to accommodate state interests in this

area. In asserting jurisdiction over the Nevada casino industry the Board said that it was "fully cognizant of the unique problems of enforcement existing in the gambling industry," and that its experience had been that there was no conflict between Nevada's regulation of its casinos and federal regulation of unions within the casino industry. The Board specifically said that there was no present or foreseeable conflict between "contractual tenure" rights of employees under collective bargaining agreements and the continuing qualification requirements imposed on those employees by Nevada's gaming regulations. On the contrary, the NLRB concluded: "It clearly appears that all parties have accommodated themselves successfully to the pattern of collective bargaining without any demonstrable adverse effect on supervision of gambling activities." *El Dorado, Inc., supra,* 15 N.L.R.B. at 583.

Thus, the Board has been able to reconcile the rights of employees under the NLRA and the state regulatory restrictions on those employees. The right of employees to elect representatives of their own choosing can likewise be reconciled with section 93 of the Casino Control Act. If section 93 is upheld by this Court, it will merely prohibit certain persons from holding union office, much in the same way section 504(a) of the LMRDA does, and will in no way impede the Board's ability to enforce legitimate collective bargaining rights.

The NLRB has also asserted jurisdiction over the Florida jai alai industry. *Volusia Jai Alai, Inc.,* 221 N.L.R.B. 1280 (1975). However, in so doing it noted Florida's extensive regulation of the industry, including a requirement that workers give 15 day's notice prior to any strike, but apparently did not preceive a conflict of state and federal regulations. *Id.* at 1282-1283. *See also, Florida Board of Business Regulation etc.* v. *NLRB,* 686 F.2d, 1362, 1365-1366 (11 Cir. 1982), upholding the NLRB's determination to assert jurisdiction over Florida's jai alai industry. There is no reason to anticipate that there will be any irresolvable conflict between the NLRB's jurisdiction over the Atlantic City casino industry and

New Jersey's implementation of section 93 of the Casino Control Act.[16]

In summary, when the deeply-rooted local concerns which motivated section 93 are viewed in light of its minimal effect upon federal labor policy, the constitutional validity of the statute is manifest.

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[16] It is also noteworthy that, in declining to exercise jurisdiction over the horse-racing and dog-racing industries, the NLRB again demonstrated its sensitivity to state regulation of gambling. The Board stated:

> In prior decisions, the Board declined to assert jurisdiction over these industries noting, *inter alia*, the extensive State control over the industries. It appears that State law sets racing dates of the tracks; State law determines the percentage share of the gross wagers that goes to the State; and State law determines the percentage of gross wagers to be retained by the track. In addition, the State licenses employees, exercises close supervision over the industries through State racing commissions, and in many States retains the right to effect the discharge of employees whose conduct jeopardizes the "integrity" of the industry. As the industries constitute a substantial source of revenue to the States, a unique and special relationship has developed between the States and these industries which is reflected by the States' continuing interest in and supervision over the industries.

Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (1973) (codified at 29 C.F.R. §103.3 (1982)). Although the District Court ruled that this decision by the NLRB violated its statutory mandate, because it can only decline jurisdiction over industries not substantially affecting interstate commerce, *New York Racing Association* v. *NLRB*, 110 L.R.R.M. 3117 (E.D. N.Y. 1983), the District Court's decision was vacated on the ground that the District Court did not have jurisdiction to review the NLRB's decision. *New York Racing Ass'n* v. *NLRB*, 708 F. 2d 46 (2 Cir. 1983). An appeal has been filed with this Court. (Docket No. 83-120).

CONCLUSION

For the reasons herein stated, appellant New Jersey Casino Control Commission respectfully submits that this Court should reverse the judgment of the Court of Appeals insofar as it upheld the District Court's refusal to abstain from exercising jurisdiction, and should remand to the District Court for entry of an order dismissing the complaint. In the alternative, the Commission respectfully submits that this Court should rule that section 93 of the Casino Control Act is not preempted by federal law, and thus that the Court of Appeals erred in reversing the District Court's denial of the preliminary injunction. In the event that this Court determines not to resolve the ultimate issue of the validity of section 93, it is respectfully requested that the Court enunciate the proper preemption analysis as being a balancing of the relative federal and state interests and remand the matter for appropriate proceedings in accordance with that standard.

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SEE COMPANION CASE

NO. 83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, ACTING CHAIRMAN; DON THOMAS, COMMISSIONER; MADELINE McWHINNEY, COMMISSIONER; CARL ZEITZ, COMMISSIONER, CONSTITUTING THE CASINO CONTROL COMMISSION, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

POINT I

Abstention under the principles of *Younger* v. *Harris* is appropriate in this case.

Appellees raise two points in response to the Commission's abstention argument, both of which require a brief reply.

Appellees contend that the abstention argument should be rejected because it is not being presented in this Court by co-appellant New Jersey Department of Law and Public Safety, Division of Gaming Enforcement. However, the New Jersey Legislature has seen fit to create two state agencies to regulate casino gaming, and to provide for separate representation of each, *see*, N.J. Stat. Ann. 5:12-54(d) and -55 (West Supp. 1983), and the Casino Control Commission is pressing the abstention argument in this Court. Appellees contend that "[t]he Casino Commission has no interest in delaying . . . adjudication because its proceedings have been completed and therefore will not be interfered with by a decision here" (appellees' brief at 13). The Commission has never had and does not now have any interest in delaying adjudication. The Commission merely seeks vindication of the abstention argument it has maintained throughout this litigation. It is true that the Commission's adjudicatory hearing, as well as the investigatory and prosecutorial efforts of the Division of Gaming Enforcement, have been completed. However, the Commission has been enjoined from enforcing its remedial order, and thus it is the Commission's process which has been interfered with by the order of the Circuit Court and which would be interfered with by a decision on the merits by this Court.

Appellees' remaining argument is that abstention is inappropriate because their constitutional claims could not be resolved before the Commission. However, the state appellate courts were always available to appellees, on an interlocutory basis or on appeal of right from the Commission's final order, and appellees have in fact appealed to the Superior Court, Appellate Division from the final order and have raised the same constitutional claims presented to this Court. The state appellate courts are bound by the same constitution as the federal courts, and are obviously competent to hear and decide appellees' constitutional claims. *See, Allen* v. *McCurry,* 449 U.S. 90 (1980). The state appellate courts are also competent to grant any stay or other interim relief which may be necessary to preserve the status quo pending appeal. *Cf. Middlesex County Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423, 430, n.15 (1982).

The New Jersey Court Rules provide that on or after the filing of a notice of appeal, or notice of motion for leave to file an interlocutory appeal, from a decision of an administrative agency, a notice of motion for ad interim relief or a stay may be made to the Appellate Division. N.J. Ct. R. 2:9-7 (1984). The rules also provide that applications for temporary relief, stays and emergency orders may be made, with or without notice, to a Justice of the State Supreme Court if a matter is pending in the Appellate Division. N.J. Ct. R. 2:9-8 (1984). There is thus no substance to appellees' argument that absent a federal injunction they would be left without an avenue of interim relief from the Commission's order. For the reasons set forth in the Commission's main brief, the district court should have abstained and allowed the state proceedings to complete their orderly course, including appellees' appeal as of right to the state courts from any adverse agency determination. *See,* N.J. Stat. Ann. 5:12-110 (West Supp. 1983); *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975).

POINT II

Bus Employees v. _Wisconsin Board_ is inapposite to the present matter and utterly fails to support the conclusion that section 93 of the Casino Control Act is preempted by section 7 of the NLRA.

On the issue of preemption, this reply brief will only address the arguments raised in Point II C of appellees' brief, premised on *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951). All other arguments advanced by appellees regarding preemption have been dealt with in the Commission's principal brief.

Wisconsin Board involved a state statute which declared it to be a misdemeanor for any employee of a public utility to engage in a strike or to instigate, induce or encourage a strike. The statute further provided that whenever there was a collective bargaining "impasse" the Wisconsin Employment Relations Board was to select arbiters to "hear and decide" the dispute. 340 U.S. at 387-388. *Wisconsin Board* arrived in this Court on *certiorari* to the State Supreme Court, which had upheld *ex parte* orders of lower state courts permanently enjoining declared strikes against the Milwaukee Electric Railway and Transport Company and the Milwaukee Gas Light Company.[1]

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[1] Even this brief recitation of the operative facts in *Wisconsin Board* demonstrates its fundamental differences from the instant matter. These differences will be detailed below. The Commission therefore feels no compulsion to respond to appellees' charge that the appellants could not differentiate the case and chose instead to "simply ignore that precedent despite the Court of Appeals' strong reliance thereon." (appellees' brief at 33). As will be apparent, the Commission chose rather to focus on pertinent law in its presentation to this Court.

This Court noted that it had previously held, in *International Union of United Auto Workers* v. *O'Brien*, 339 U.S. 454 (1950), that in enacting the NLRA Congress had guaranteed the right to strike and established procedures and limitations governing that right, and had thereby "occupied this field and closed it to state regulation." *See*, 340 U.S. at 390. The Court went on to hold that the Wisconsin statute before it was invalid, explaining:

> The utilities companies, the State of Wisconsin and the other states as *amici* stress the importance of gas and transit service to the local community and urge that predominantly local problems are best left to local governmental authority for solution. On the other hand, petitioners and the National Labor Relations Board, as *amicus*, argue that prohibition to strikes with reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of national labor policy. This, it is said, leads to more labor unrest and disruption of service than is now experienced under a system of free collective bargaining accompanied by the right to strike. The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by this Court. In our view, the questions are for legislative determination and have been resolved by Congress adversely to respondents. [340 U.S. at 397].

Appellees conclude from the above language of *Wisconsin Board* that the balancing test so carefully developed in such cases as *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), and *Local 926* v. *Jones*, —— U.S. ——, 103

S. Ct. 1453 (1983), should be discarded in evaluating the constitutionality of section 93 of the Casino Control Act, N.J. Stat. Ann. 5:12-93 (West Supp. 1983), and that the compelling state interests which underly section 93 should be ignored. However, *Wisconsin Board* does not establish an exception to the *Garmon* balancing approach. As the *Garmon* Court itself said:

> When the exercise of state power over a particular area of activity threatened interference with clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. [Citing, *inter alia, Wisconsin Board.*] However, due regard for presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but a promotor of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citations Omitted]. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of power to act. [359 U.S. at 243-244].

In *Wisconsin Board,* and earlier in *O'Brien,* the Court had canvassed the language and legislative history of the NLRA, and concluded that Congress had left no room for state enactments limiting the right to strike. In *Wisconsin Board,* the Court also noted that Congress had itself expressly rejected a proposal to restrict that right as it applies to public utilities. 340 U.S. at 390-394. The Court was faced with a statute which completely eliminated the right to strike with regard to workers in public utilities

in Wisconsin and struck down the statute. *Wisconsin Board* is merely an example of a state legislating in an area which has been entirely occupied by Congress and enacting a statute which directly conflicts with national labor policy.

In contrast, in adopting section 93 of the Casino Control Act New Jersey did not enter a field in which Congress had left no room for state enactments and did not contradict national labor policy. As discussed in the Commission's principal brief, in enacting the disqualification criteria of section 504 of the LMRDA, and in approving the compact involved in *DeVeau,* Congress made clear that it was not occupying this field to the exclusion of state regulation. As also previously explained, in *DeVeau,* 363 U.S. at 152, this Court made clear that section 8 of the Waterfront Commission Act, Title 29, N.Y. Unconsol. Laws, Sec. 9933 (McKinney 1974), did not conflict with or seriously impede national labor policy as set forth in section 7 of NLRA, 29 U.S.C. 157 (1973), and the same conclusion must be reached with respect to section 93 of the Casino Control Act.

The principal point of appellees' argument is that preemption is mandated where there is a direct conflict between federal and state enactments. The Commission does not take issue with this assertion. Where Congress has guaranteed the right to engage in an activity, a state statute prohibiting that activity cannot stand. The Commission's point has always been that section 93 does not contradict federal labor policy as embodied in section 7. This is made clear, not by references to cases dealing with the right to strike, but by reference to legislative pronouncements (adoption of section 504 and approval of the compact involved in *DeVeau*) and judicial pronouncements (the *DeVeau* opinion) directly on point.

In fact, appellees themselves concede that section 504 of the LMRDA does not have preemptive effect (appellees' brief at 27), but nonetheless conclude that section 7 of the NLRA preempts section 93. However, the LMRDA was an amendatory readoption of the NLRA. Appellees apparently impute to Congress an intent, evidenced by its adoption of section 504, to allow state enactments establishing additional disqualification criteria for labor leaders, while at the same time precluding all such enactments by readopting section 7.

Appellees later argued (Appellees' brief at 34) that by adopting the LMRDA in 1959 Congress ratified the decision in *Hill* v. *Florida,* 325 U.S. 536 (1945), a decision which appellees interpret as precluding any state legislation which applies qualification criteria to labor union officials. Again, appellees are contending that Congress adopted section 504 as a non-preemptive provision of the LMRDA, thus allowing for state enactments in this area, and at the same time ratified *Hill,* thus precluding all such enactments. In dealing with what they contend is a cohesive national labor policy, it is remarkable that appellees impute such schizophrenic motives to Congress.

Clearly, by enacting the disqualification criteria of section 504, and choosing not to give preemptive effect to that section, Congress allowed for state enactments in the area. On the other hand, some state enactments may well be so broadly and unnecessarily intrusive upon the right to choose representatives that they should be stricken in deference to section 7. However, it is at least manifest that state statutes of this type are not to be discarded based on an absolutist concept of the right to choose representatives, but must be examined on a particularized basis which balances any incidental strictures on the right against the purported state interest. It is difficult to imagine a more circumscribed and justified example of

such a statute than section 93. As Judge Becker said in his dissent below, it is a rare case in which a state statute disqualifying labor leaders can stand, but the present case, like *DeVeau,* is such a case. In any event, the majority of the Circuit Court surely erred in rejecting the statute out of hand, just as appellees now urge this Court to do.

One final point which requires a brief reply is appellees' attack on the section 93 remedy relating to the prohibition of dues collection. It is clear, and the Commission has ruled (A208a-A216a), that the only purpose of section 93 is to remove disqualified individuals from positions of authority within casino industry labor unions. The dues-prohibition remedy is merely a means to that end. The primary issue before this Court is whether section 7 of the NLRA precludes New Jersey from pursuing that end. If the Commission is correct in arguing that New Jersey can disqualify certain casino industry union leaders, the separate issue of the propriety of the dues-collection remedy arises. In *International Longshoremen Assoc.* v. *Waterfront Commission,* 642 F.2d 666, 670-671 (2 Cir. 1981), *cert.* den. 454 U.S. 966 (1981), the Court noted that the plaintiffs in *DeVeau* had challenged the propriety of the dues-prohibition remedy in section 8 of the Waterfront Commission Act and that this Court, in affirming the dismissal of the complaint, "had necessarily upheld, against a claim of preemption, the validity of the dues-collection prohibition." The *International Longshoremen's* Court went on to uphold the dues-collection remedy against a First Amendment challenge, but that issue is not now before this Court. At any rate, the Commission respectfully submits that the dues-collection prohibition is a reasonable and necessary means of achieving the statutory purpose

of section 93, and that this remedial provision should once again be upheld.

Respectfully submitted,

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HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, et al.,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

The Atlantic City Casino Hotel Association and Playboy Hotel Casino hereby respectfully move for leave to file the attached brief *amici curiae* in support of Appellants. The consent of the attorneys for the Appellants was requested; the Appellants neither consent nor object to the filing of the attached brief. The consent of the attorney for the Appellees was requested but refused.

The Atlantic City Casino Hotel Association currently has eight members—eight of the nine casino hotels in Atlantic City. Its members are Bally's Park Place Casino Hotel, Caesars Boardwalk Regency Hotel Casino, The Claridge Hotel And Casino, Golden Nugget Hotel Casino, Harrah's Marina Hotel Casino, Resorts International Casino Hotel, The Sands Hotel & Casino, and Tropicana Hotel & Casino.

The Playboy Hotel Casino, the ninth hotel casino in Atlantic City, is not currently a member of the Association for reasons totally unrelated to this case.

The interest of the Association and Playboy Hotel Casino in this case arises from the fact that the Association's members and Playboy Hotel Casino are subject to the same federal and state statutes, regulations, and procedures as the Appellees. More specifically, the officers, agents, and employees of each Atlantic City casino hotel are subject to the licensing, registration, and disqualification provisions of New Jersey's Casino Control Act, N.J. Stat. Ann. §§ 5:12-1, *et seq.* (West Supp. 1981), and are subject to the enforcement procedures of the Appellants in the same manner and at least to the same extent as the Appellees. The Association and Playboy Hotel Casino thus have a vested interest in the outcome of this case.

While each Atlantic City casino hotel does not always agree with the manner in which the Appellants apply the Casino Control Act,[1] the Association, its members and Playboy Hotel Casino support the state statute and its underlying purpose—to protect the people of New Jersey and the employers, employees, bargaining representatives, and patrons of the Atlantic City casino gambling industry from infiltration by criminals and organized crime.

Because Appellants are not charged by statute with the responsibility for regulating the day-to-day labor-management relations within the Atlantic City casino gambling industry, they do not possess the same knowledge of the facts and history of labor-management relations in said industry as the Atlantic City casino hotels. For example, the Appellants may not know, but the casino hotels obviously do know, that Local 54 has never been certified

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1. See, e.g., *Bally Manufacturing Corp. v. Casino Control Commission*, 534 F.Supp. 1213 (D.N.J. 1982).

by the NLRB as the exclusive bargaining representative of any employees of any casino hotel in Atlantic City. Local 54 has instead obtained its representational status through voluntary recognition by each of the casino hotels in Atlantic City. While the difference between NLRB certification and voluntary recognition may not be critical to the disposition of this case, the Third Circuit repeatedly referred to the Union as the "certified" bargaining representative of certain employees in the Atlantic City casino industry. 709 F.2d at 817, 825, 830, 831 and 832. The casino hotels' factual knowledge may, therefore, be helpful to this Court in correcting factual errors in the decision below.

Because the Appellants, as state agencies, are expressly excluded from the coverage of the NLRA, as amended, by the provisions of Section 2(2) of the Act, 29 U.S.C. § 152(2), they do not possess the same experience or knowledge of federal labor law as the Atlantic City casino hotels, who are covered by the NLRA.

It is, therefore, submitted that the brief which *amici curiae* are requesting permission to file contains both factual and legal arguments which Appellants are not in a position to make. If the arguments are accepted, they would be dispositive of the pre-emption issue.

Respectfully submitted,

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BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The Atlantic City Casino Hotel Association currently has eight members—eight of the nine casino hotels in Atlantic City. Its members are Bally's Park Place Casino Hotel, Caesars Boardwalk Regency Hotel Casino. The Claridge Hotel And Casino, Golden Nugget Hotel Casino, Harrah's Marina Hotel Casino, Resorts International Casino Hotel, The Sands Hotel & Casino, and Tropicana Hotel & Casino.

The Playboy Hotel Casino, the ninth hotel casino in Atlantic City, is not currently a member of the Association for reasons totally unrelated to this case.

The interest of the Association and Playboy Hotel Casino in this case arises from the fact that the Association's members and Playboy Hotel Casino are subject to the same federal and state statutes, regulations, and procedures as the Appellees. More specifically, the officers, agents, and employees of each Atlantic City casino hotel are subject to the licensing, registration, and disqualification provisions of New Jersey's Casino Control Act, N.J. Stat. Ann. §§5:12-1, *et seq.* (West Supp. 1981), and are subject to the enforcement procedures of the Appellants in the same manner and at least to the same extent as the Appellees. The Association and Playboy Hotel Casino thus have a vested interest in the outcome of this case.

SUMMARY OF ARGUMENT

The principal argument of this Brief is that the New Jersey statute and procedures under examination are not pre-empted whatsoever by federal law. Insofar as the direct area of concern—the disqualification of persons from

serving as union officials because of their prior criminal activities—was ever thought to be within the NLRB's jurisdiction under Sections 1 and 7[1] of the NLRA, Congressional passage of the LMRDA removed jurisdiction from the NLRB and gave it to the federal courts. In other words, the LMRDA stands as a Congressional statement that Section 7 does not, and was never intended to, prevent federal courts from disqualifying union officials in certain circumstances.

It is thus the LMRDA, not the NLRA, which represents Congress' exercise of jurisdiction in the subject area here in issue. Both the express terms of the LMRDA and its legislative history, however, prove that Congress had no intention of pre-empting the field, but instead fully intended that the states be left free to exercise their police power to prevent criminal infiltration of organized labor.

ARGUMENT

POINT ONE

THE LMRDA DOES NOT PRE-EMPT THE NEW JERSEY CASINO CONTROL ACT

By express provision, the LMRDA does not and was not meant to pre-empt similar state legislation. Section 603(a) of the LMRDA, 29 U.S.C. § 523(a), states:

> Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any state . . . .

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1. To the extent that the "freedom of association" guaranteed in Section 1 of the NLRA is incorporated in the right to choose a collective bargaining representative provided in Section 7 of the Act, this Brief, for purposes of brevity, shall hereafter refer simply to Section 7.

The Third Circuit's characterization of this section as "a savings clause [limited to] preserving state law remedies for breach of fiduciary duties," 709 F.2d at 827, is entirely without justification or support. The savings clause applies to the entirety of the LMRDA.

In the first place, Section 603 applies, by its own explicit terms, to "this chapter," not to "this subchapter." "This chapter" is by definition the entirety of the Act, and is so defined throughout. For example, the separability provision, 29 U.S.C. § 531, uses the term "this chapter" and clearly intends application to the entirety of the Act. *See also* 29 U.S.C. § 525. In 29 U.S.C. § 521, the statute enables the Secretary of Labor to take action to remedy "any provision of this chapter (except subchapter II of this chapter)."

When Congress intended to limit a provision to a part of the Act, it so specified by using the term "subchapter," *e.g.* 29 U.S.C. § 483, or by using a specific section number, *e.g.* 29 U.S.C. § 482(a). The annotation to Section 603 itself states that

> 'This chapter,' referred to in subsections (a) and (b), was in the original 'this Act,' meaning Pub.L. 86-257 which added this chapter . . . .

29 U.S.C.A. § 523, Historical Note, "References in Text." The use of the word "chapter" in the savings clause thus clearly indicates that the entirety of the LMRDA, not just one subchapter or section, is not pre-emptive of similar state legislation.

Thus, by the express terms of the statute, the savings clause (Section 603) applies to the entirety of the LMRDA (Title 29, Chapter 11, enacted as Pub.L. 86-257) in general, and to 29 U.S.C. § 504 (Pub.L. 86-257, Title V, § 504) in particular. The Third Circuit's assertion that "there is

no equivalent savings provision in section 504," 709 F.2d at 828, is simply wrong.[2]

The legislative history of the LMRDA is similarly unequivocal. The Senate discussed the problem that the Act might be construed as pre-emptive and designed Section 603 specifically to prevent such an interpretation, over the objection of at least one senator who argued that the LMRDA *should* be pre-emptive.

Debating the very first provision of the bill, Senator Kennedy raised the question of whether such protection could best be secured by the LMRDA, the NLRA, or by state laws. He explained that the question needed to be raised

> because I think the amendment raises the question of pre-emption. In other words, if the proposal were enacted, the present rather exhaustive remedies provided under the common law of the various states might be wiped out . . . .

Legislative History of the LMRDA of 1959, p. 255 (no publisher or date; U.S. Doc. Ref. L21.5: L 11/2). Senator Kennedy went on to state that the body of state law to which he referred went beyond the criminal law provisions; he saw a need to protect state laws from federal pre-emption beyond the protection provided in 29 U.S.C. § 524. *Id.* at 256.

Section 603(a) was thus added. In the words of Congressman Dent, it was "designed to encourage states to enact state legislation imposing additional restrictions on labor unions' conduct of their own internal affairs . . . ." *Id.* at 1127. In other words, the LMRDA was not only intended to preserve state legislation such as the New Jer-

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2. Section 504 is in the same Title and subchapter as the fiduciary responsibility sections—i.e., Sections 501-503—anyway. The Third Circuit's reasoning and conclusion are simply unfathomable.

sey Casino Control Act, but also to promote the passage of such legislation.

Perhaps the strongest statement of a legislator, however, is a statement by Senator Morse as to why Section 603(a) should *not* be adopted:

> This is a 'States Rights' provision which flies in the face of traditional concepts in the field of national labor relations policy and law and has no place in legislation which is designed to remedy, through Federal law, deficiencies in State law enforcement which have been largely responsible for allowing crooks and racketeers to work their way into the labor and management fields.
>
> In fact, Mr. President, in regard to the so-called States' rights argument, it should be said that the States have a great deal to answer for because of the fact that they have not enforced their own criminal laws against the racketeers and the crooks. They have been inclined to 'pass the buck' to the Federal Government. They want it both ways.

Id. at 1135.

In short, the arguments presented by Local 54 and accepted by the Third Circuit in favor of the LMRDA's preemptive effect have already been made to and rejected by the Congress at the time the LMRDA was enacted. Congress' intent was clear; Section 603(a) was added to preserve the states' rights to regulate internal union affairs, in order to prevent racketeering. It was added precisely to preserve a state's right to pass the sort of legislation now before the Court, and reconsideration of the issue, in the face of clear Congressional intent, is inappropriate.

Furthermore, this Court has already held that the LMRDA is not pre-emptive. *DeVeau v. Braisted*, 363 U.S. 144 (1960), is controlling authority on this point and should

have been followed by the Third Circuit. Trying to show that *DeVeau* means something other than what it says—i.e., that the LMRDA does not pre-empt the type of state legislation here presented—the Circuit stated as follows:

> Frankfurter's opinion did not command a majority . . . . Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on Congressional intent in approving the compact.

709 F.2d at 829. In fact, Justice Brennan's concurring opinion reads as follows:

> Mr. Justice Brennan is of the opinion that Congress has demonstrated its intent that Section 8 of the New York Waterfront Commission Act should stand despite the provisions of the National Labor Relations Act, and *that the Labor Management Reporting and Disclosure Act of 1959 explicitly provides it shall not displace such legislation of the States.*

363 U.S. at 160-61 (emphasis added).

One must wonder whether this is the same opinion read by the Third Circuit. In plain and unambiguous English, Mr. Justice Brennan, like four other members of the Court,[3] affirmed the lower court on two grounds, one of which was that the LMRDA explicitly does not pre-empt this sort of state legislation.

In conclusion, every factor to which this Court looks in construing a statute shows that the LMRDA does not pre-empt the New Jersey statute: the LMRDA explicitly and unambiguously states that it is not pre-emptive; the

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3. The Circuit's statement that Justice Brennan's opinion "was critical for the judgment" is similarly inaccurate. Only eight Justices heard the appeal. Even if Justice Brennan had joined the dissent, the lower court's opinion would have been affirmed by an equally divided Court, i.e., the judgment would have been the same. The importance of his opinion is that, insofar as it agrees with that of Justice Frankfurter, it creates binding precedent which the Third Circuit has ignored.

legislative history shows that Congress included Section 603(a) specifically to preserve and promote overlapping state legislation; and this Court has held, in a consensus majority opinion, that the LMRDA does not pre-empt a roughly identical state statute.

POINT TWO

THE NLRA DOES NOT PRE-EMPT THE NEW JERSEY CASINO CONTROL ACT

Answering the question of whether the LMRDA pre-empts the instant state exercise of police power also answers, by implication, the question of whether the NLRA pre-empts it. Essentially, applying Congress' intent in passing the NLRA to this case boils down to one question: In passing Section 7, did Congress intend to include in employees' "freedom of choice" the right to choose convicted felons as their collective bargaining representatives, especially in industries highly susceptible to criminal infiltration?

With no more guidance than the statute itself and a legislative history void of comment, the question would be a debatable one. One would have to balance the theoretical lack of qualification on employee freedom, implied by a literal reading of the statute itself, against the practical absurdity of encouraging labor racketeering in an industry fertile for such abuse.

It is no longer necessary, however, to consider this question in the abstract. When Congress enacted Section 504 of the LMRDA, it proved three points.

First, the passage of the LMRDA shows that Congress considered such legislation to be necessary. By implication, Congress recognized that unlimited employee freedom is not the aim of Section 7.[4] Specifically, some control

4. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945).

must be placed on the kinds of persons authorized to act as employee representatives in order to prevent labor unions from becoming federally-sponsored labor rackets. Even if one could have reasonably argued, in 1945,[5] that Congress intended employee freedoms to extend to the selection of convicted felons as their collective bargaining representatives, the argument became untenable upon passage of the LMRDA in 1959. Congress clearly recognized that Section 7 freedoms are properly restricted by legislation disqualifying a certain class of persons—persons who, by an objective standard, are likely to misuse the influence of organized crime in labor unions—from serving as union officials.[6]

Second, passage of the LMRDA shows that Congress had never considered the prevention of criminal infiltration in labor unions to be a purely federal question. The LMRDA was passed *not* because Congress felt it necessary to exercise pre-emptive or exclusive federal jurisdiction in the area, but rather because it needed to exercise concurrent jurisdiction in an area where state regulation was inadequate. The LMRDA was adopted in large part because state and local authorities had failed to adopt "effective measures to stamp out crime and corruption [in unions] and guarantee internal union democracy . . . ." *Longshoremen v. Waterfront Commission,* 495 F.Supp. 1101, 1123 (S.D.N.Y., 1980), *quoting* Sen. Rep. No. 187, 86th Cong., 1st Sess., April 14, 1959, p. 6.

If Congress passed the LMRDA to remedy the states' failure to pass similar laws, it must have considered, *a fortiori,* that the states were empowered to pass such

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5. When *Hill v. Florida,* 325 U.S. 538 (1945), was decided.

6. As Justice Frankfurter very eloquently stated, "Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however, dialectically plausible, of that policy?" *DeVeau v. Braisted, supra,* at 153.

laws. Both the passage of the LMRDA and the legislative history underlying it are positive proof that Congress does not consider its jurisdiction in the area exclusive and does not believe that Section 7 of the NLRA pre-empts state jurisdiction to control criminal infiltration of labor organizations.

As this Court noted in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 771 (1947),

> Congress [in passing the NLRA] has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulations either shall or shall not exclude state jurisdiction.

The LMRDA has provided, however, the guidance absent when the NLRA was passed.

The manner of enforcement Congress chose for the LMRDA also sheds light on the pre-emptive effect of Section 7. The National Labor Relations Board is charged with enforcement of Section 7; if Section 7 pre-empts disqualification of union officials for criminal conduct, then such disqualification must come under the Board's jurisdiction. This is true even if the Board has decided that no such regulation is appropriate or approved under the policy of the NLRA. *Id.* at 774.

In other words, it is the NLRB which is charged with enforcement of Section 7, and if Section 7 was truly intended to extend the absurd degree of "freedom of choice" here argued by Local 54, the Board would have been given the sole power to safeguard that freedom. If Congress wished to modify Section 7, then, it would make the modification under the Board's jurisdiction, by instructing the Board not to certify persons convicted of felonies or labor organizations employing them.

But enforcement of Section 504 was not given to the Board. Instead, it was placed in the courts, and the courts

were given exactly the power to do what this Court forbade the State of Florida to do in *Hill v. Florida, supra*: that is, to interfere if necessary, with the Board's collective bargaining process in order to prevent labor racketeering. Certainly, a federal district court's jurisdiction under Section 504 preempts the Board's jurisdiction to certify a collective bargaining representative. Where Section 7 and Section 504 come into conflict, Section 504 must and does prevail because the courts, and not the Board, have preemptive jurisdiction in the area of disqualifying union officials for criminal conduct.[7]

By its action in passing the LMRDA, Congress has, in effect, stated that this area is outside the Board's jurisdiction. If state regulation in this area is pre-empted, it is not by Section 7, but by Section 504.

In other words, Congress has passed two distinct statutes, the NLRA and the LMRDA. If one of them pre-empts state action, it must be Section 504 of the LMRDA, because Section 504, not Section 7, is the statute passed on the same subject area. In 1945, it was necessary to speculate on whether state regulations of union officials' qualifications conflicted with Section 7, because there was a possibility that Congress had intended Section 7 as a comprehensive exercise of its power to prescribe the qualifications of labor representatives. Since the passage of the LMRDA, however, such speculation is inappropriate. Congress clearly intended Section 7 to cover certification questions not involving the prior criminal convictions of union officers, an area reserved to the courts and finally exercised, by passage of Section 504, in 1959.

This principle of statutory construction has previously been considered and approved by the Court. In *DeCanas*

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7. The Board itself considers that matters treated in the LMRDA are outside its statutory competence. Its decision in *Alto Plastics*, 136 N.L.R.B. 850 (1962), where it certified a union controlled by a known labor racketeer, is extremely instructive on this issue.

v. Bica, 424 U.S. 351 (1976), migrant farmworkers sued their former employers under a provision of the California Code which forbade employment of certain illegal aliens. The state court invalidated the statute, partly on the grounds that it was pre-empted by the Immigration and Naturalization Act. This Court reversed, finding the state statute not pre-empted by the INA.

As part of its rationale, the Court looked to Congress' passage of the Farm Labor Contractor Registration Act, which forbade farm contractors from employing illegal aliens. The Registration Act was both more recent in enactment than the INA and more specific in its coverage of the conduct involved. The farmworkers urged that Congress' passage of the Registration Act showed that Congress had "unmistakably . . . ordained exclusivity of federal regulations in the field." *Id.* at 361. The Registration Act also contained, however, language that showed it was not intended to pre-empt state legislation in the area.

This Court inferred from the Registration Act's non-preemption language that not only the Registration Act, but also the INA, was not pre-emptive.[8] The Court considered the Registration Act to be "persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters afffecting employment of illegal aliens, and therefore barring state legislation . . .", also calling it "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject." *Id.* at 362, 363.

This analysis in *DeCanas* is precisely the analysis that should be applied to the NLRA and LMRDA. Where

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8. There were additional grounds for this holding, most notably a lack of federal exclusivity within the INA itself (unlike the NLRA). The case is not cited, however, for substantive precedent, but for the analysis used to determine Congressional intent when a later, more specific federal statute is passed.

Congress passes a broad and somewhat vague statute that seems to pre-empt a certain area of state legislation—such as the INA or NLRA—but later passes a specific statute that explicitly does *not* pre-empt that area of state legislation—such as the Registration Act or Section 504 of the LMRDA—the correct inference to be drawn is that Congress intended neither of its statutes to be pre-emptive in the area.

The LMRDA was not Congress' last pronouncement on this subject. Congress' enactment of Title IX of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, and of Chapter 96 to Title 18 of the United States Code, 18 U.S.C. §§ 1961-1968 (Racketeer Influenced and Corrupt Organization or "RICO"), further confirms that neither the LMRDA nor the NLRA was intended by Congress to pre-empt the type of state legislation at issue here. RICO defines "enterprise" to include "any union," 18 U.S.C. § 1961(4), and gives the federal courts the power to order any person "employed by or associated with any" racketeering enterprise, 18 U.S.C. § 1962(c), "to divest himself of any interest, direct or indirect", in said enterprise. 18 U.S.C. § 1964(a). In Section 904(b) of Pub.L. 91-452, Congress expressly provided that:

> Nothing in this title shall supersede any provision of Federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

As this Court noted in *United States v. Turkette,* 452 U.S. 576 (1981) (a criminal case):

> RICO imposes no restrictions upon the criminal justice systems of the states. . . . Thus, under RICO, the states remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate

> acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

Id. at 586 n. 9.

Thus, just like the LMRDA, RICO clearly proves that preventing criminals—and in the case of RICO, persons associated with criminals—from involvement with labor organizations is an area not pre-empted by Section 7; that insofar as there is a conflict between the NLRA and laws dealing with the removal of criminal elements from labor unions, the latter must control; and that the states are permitted, and even encouraged, to develop legislation in the area.

POINT THREE

THIS COURT'S PRECEDENT CONFIRMS THAT THE NEW JERSEY STATUTE IS PROPER

A. The Principal Cases

Although this Court has decided numerous cases involving pre-emption of state law by federal labor legislation, only two decisions are close enough to the facts of this case to be considered controlling: *Hill v. Florida*, 325 U.S. 538 (1945), and *DeVeau v. Braisted*, 363 U.S. 144 (1960). A comparison of the facts, holdings and circumstances of these two cases shows that *DeVeau* should be applied to the present facts, and New Jersey should be permitted to enforce its Casino Control Act.

In *Hill v. Florida*, the State had passed a statute generally regulating labor unions and their agents. It required, inter alia, that labor unions doing business in the state obtain a license, pay a $1.00 fee, and file an annual report. It also required a license and $1.00 of all union agents, and stipulated that they be of good moral character, free of any felony convictions, and citizens for

at least ten years in order to qualify for the license. Violation of the statute was a misdemeanor.

The petitioner union and its business agent, Mr. Hill, were enjoined from functioning as such until they had obtained the requisite licenses. This Court struck down the injunctions and declared that the statute had been applied in a manner which infringed upon the NLRA so substantially as to violate the Supremacy Clause.

In the instant case, the Third Circuit relied on *Hill* as standing for the proposition that Section 7 precludes a state from passing any law which might disqualify a labor union or union agent from functioning as a bargaining agent. This analysis is not sound, for two principal reasons: the facts of *Hill v. Florida* are critically different from the facts here considered, and subsequent developments—the passage of the LMRDA and the decision in *DeVeau*—have limited the scope of *Hill's* applicability.

B. The Present Case Is Distinguishable From Hill v. Florida

The Florida statute overturned in *Hill* was an out-and-out attempt by the state to regulate labor unions and their officials in every business in the state. Its sole purpose was to license unions and their agents, and to prescribe qualifications for the license.

The New Jersey statute here considered is not a statute designed to regulate unions and their agents. It is instead a statute designed to regulate a single industry—casino gambling—over which states have historically exercised primary control, and only in one location—Atlantic City. The impact on Section 7 rights is purely a derivative effect of a proper exercise of the state's police power, a power exercised to prevent the infiltration of criminals and organized crime into the Atlantic City gaming industry. The possible impact on Section 7 rights is, fur-

thermore, limited to a narrow part of the employment spectrum, those employees whose labor representatives are in a position to put pressure on gaming employers. Similarly, the state regulations themselves are narrow; they do not seek to regulate employment relations, but merely to take reasonable measures to prevent possible takeovers by crime syndicates. The degree of impact on labor-management relations is minimal and is incidental to the Act's purpose.

In *Hill*, the police power exercised by Florida was the power to regulate employment relations, and the statute was correspondingly broad. By and large, cases which have prevented states from intruding into matters covered by the NLRA have similarly been cases in which the states have attempted to regulate labor relations in a manner which directly conflicts with the NLRB's jurisdiction. *E.g., Hill v. Florida; Bethlehem Steel Co. v. NLRB*, 330 U.S. 767 (1947); *Street Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951); *U.A.W. v. O'Brien*, 339 U.S. 454 (1950).[9] The police power exercised by New Jersey, on the other hand, is the power to prevent its fledgling casino gambling industry from the inevitable efforts of organized crime to infiltrate it, and the statute is correspondingly tailored.

In cases where an otherwise valid exercise of a state's police power has existed—that is, where the purpose of the legislation has not conflicted with pre-emptive federal legislation—this Court has been willing to balance some impact on the NLRA with the states' need to protect the

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9. In fact, since *Hill*, this Court has summarily reversed several cases in which a state court purported to regulate labor union activities under state laws which, like *Hill*, had as their underlying purpose the regulation of labor relations in direct conflict with the primary jurisdiction of the NLRB. *E.g., Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884 (1956); *Electrical Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957).

citizenry. In *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), for example, the Court allowed the State to enjoin union conduct such as mass picketing, threats of violence, and the picketing of residences. There the Court stated that it would "not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States" in an area involving traditionally local matters. *Id.* at 749. Certainly, the regulation of gambling is almost exclusively a matter of state law; and the New Jersey statute, as applied in this case, has less impact on labor-management relations than do state court strike injunctions.

Similarly, in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), the Court allowed a state court to enjoin labor picketing which constituted a violation of state trespass laws. *See also, e.g., Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); *U.A.W. v. Russell*, 356 U.S. 634 (1958).[10]

This is not to say that the Court may not strike down laws of general applicability when aspects of the challenged law conflict with federal labor policy. Rather, it is to show that *Hill v. Florida* was in a class of cases almost certain to be struck down, a class to which the present case does not belong.

C. The Intervention of DeVeau and Passage of the LMRDA

1. The Holding in DeVeau

Even assuming that *Hill*, at the time it was decided in 1945, would have been controlling precedent in the present

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10. Cf. *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 533 (1979) ("the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of ensuring employment security in the state").

case, the subsequent decision in *DeVeau v. Braisted*, 363 U.S. 144 (1960), and its acknowledgement of changes wrought in this area by the passage of the LMRDA, require that *Hill* be substantially limited to circumstances not present here.

DeVeau arose from the passage of New York's Waterfront Commission Act, which comprised three parts: Part I established a bi-state agency in connection with similar legislation in New Jersey, an action which constituted an agreement or "compact" between the states requiring Congressional approval under the Constitution; Parts II and III, not part of the compact requiring Congressional approval, included a provision, quite similar to the New Jersey statute at issue here, prohibiting a labor organization from collecting dues from waterfront employees if any of its officers or agents had ever been convicted of a felony.

In affirming New York's right to enforce the statute, the Court followed two lines of analysis. The first dealt with whether Congress intended to pre-empt such legislation. The Court held, with sound reason, that the issue of pre-emption had been brought to Congress' attention even though it was not *per se* part of the interstate compact approved. If Congress had intended that this kind of legislation be proscribed by federal law, it would likely have manifested its intentions in adjudicating the compact. The second dealt with the merits of whether federal labor laws could be said to pre-empt the Waterfront Act.

In the opinion below, the Third Circuit seized on the first line of analysis to distinguish *DeVeau* from the present case. Because *DeVeau* involved state legislation approved by Congress, the court reasoned, it applies only to cases where Congress has expressly approved the state legislation at issue. This attempt to distinguish *DeVeau* is faulty for two reasons. First, the Third Circuit misunderstood and thus misapplied Congress' action in approving the in-

terstate compact. Congress' approval constituted a general statement on its intention that the states be allowed to pass laws such as the Waterfront Act, as well as a specific approval of the Waterfront Act. As such, it supports the State's position as much as the Union's. Second, the *DeVeau* Court did not depend solely upon Congress' approval of the compact for its decision; it also relied upon the merits of the pre-emption issue, an analysis equally applicable to the present case.

2. Congress' Approval of the Compact in DeVeau Was of General Significance and Should Be Extended to This Case

The Third Circuit read Congress' approval of the interstate compact in *DeVeau* as nothing more than a distinguishing feature of the case which rendered *DeVeau* inapplicable to any case where express Congressional approval has not been given to a State regulatory scheme. Such an interpretation is not only incorrect, but also ignores the general Congressional support of such legislation manifested by Congress' action.

Assuming that Congress' approval of the compact did, in fact, include tacit approval of the New York regulatory scheme,[11] one must ask why Congress would approve such a scheme if it had intended federal labor law to pre-empt such legislation. Are the NLRA and LMRDA so well-crafted that there is no need for states to pass legislation preventing criminal infiltration of sensitive industries through control of labor unions? Obviously not; Congress' assumed approval of the concurrent state legislation is a clear indication that Congress believed in the need for legislation such as the New York Waterfront Commission Act.

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11. Of course, if this assumption is not made, *DeVeau* is indistinguishable from the present case and the Third Circuit should be reversed summarily.

Is it improper, then, as the means to prevent such infiltration, for a state to disqualify persons convicted of felonies from serving as labor officials, even if they are eligible under Section 504 of the LMRDA? Once again, the answer is no. Congress, by approving the compact and thereby tacitly favoring Section 8 of the New York Act, indicated that such a state law is a proper means for a state to accomplish a proper end.

Is it Congress' position, then, that such laws are acceptable only if submitted to and ratified by Congress prior to their implementation? Certainly not; such a position is entirely unsupported by any authority and approaches the realm of absurdity.

The only reason Congress was even able to consider the Waterfront Act was that it involved a compact between two states. Such a compact can only be made with the consent of Congress, under the prohibition of Article I, Section 10 of the Constitution. *E.g., Virginia v. Tennessee*, 148 U.S. 503 (1893). Congress does not routinely render opinions on the validity of state legislation. It has neither the time, the procedures, nor perhaps the Constitutional power to decide such questions.

Insofar as Congress indicated approval of the Waterfront Act, it was not an attempt to usurp the courts' function and pass on a specific piece of state legislation. The specific legislation was not even before it. Rather, Congress' lack of concern with Parts II and III of the Waterfront Act must be interpreted as reflecting its general endorsement of a state's right to pass such legislation, where the legislation is narrowly drawn, interferes as little as reasonably possible with federal labor relations policy, and is necessitated by a genuine need for the legislation at the state level.

In other words, it is reasonable to assume, as this Court did in *DeVeau*, that Congress knew of Parts II

and III of the Waterfront Act when it approved Part I. If Congress had been concerned that the implementation of Parts II and III would be contrary to Congressional intent—that is, if it thought the NLRA and LMRDA had pre-empted this sort of legislation—it could have refused its approval and would almost certainly have noted its doubts. Congress' approval of the compact thus stands as a theoretical, generic and *advisory* statement on pre-emption. Congress' approval cannot stand, however, as a statement that it could approve specific state legislation which technically neither was nor should have been under its consideration.

Under the doctrine of judicial restraint, the *DeVeau* Court correctly limited its decision to the facts before it. The Court was not faced with interpreting Congress' approval of the Waterfront Act except in the context of deciding whether the specific Act was pre-empted. In the context of the present case, however, a more exact reading of the same Congressional approval must be developed. Congress there indicated a belief that this sort of narrowly-drawn legislation was not pre-empted by federal legislation, not that it should adjudicate pre-emption on a case-by-case basis.

Even if Congress *had* specifically authorized the Waterfront Act, it has not had and will never have an opportunity to authorize the instant legislation. One would then have to decide whether Congress, having approved a state law forbidding unions from collecting dues from longshoremen if the unions' officers were convicted felons, would disapprove the same state's law forbidding unions from collecting dues from gaming industry employees under the same circumstances. The jump from waterfront terminals to casino hotels, in terms of the problem involved—i.e., its attractiveness to organized crime, the likeli-

hood of labor abuse, and the actual history of attempted organized crime infiltration in the industry—is a very, very short one. The only substantial difference between this case and *DeVeau* is that in *DeVeau* New Jersey signed a cooperative compact with New York, whereas in this case it has not and could not.[12] It would be manifestly unjust to deprive New Jersey of the right to protect its citizens from organized crime in one case but not in another, where the only difference was the fortuitous and irrelevant existence of a compact with another state.

3. The Purpose and Scope of the State Legislation, and the Degree of Its Impact on the NLRA, Were Factors in the DeVeau Decision As Important As Congress' Approval of the Interstate Compact

The Third Circuit's finding that *DeVeau* was determined by a single factor—Congress' approval of the interstate compact—ignores the primary holding of the case. Congressional approval was an unusual circumstance and an important one to this Court's discussion, but it was certainly not the only factor taken into account, and arguably was not the most important factor.

The legal analysis in *DeVeau* begins, at 363 U.S. 151, with the words "[w]ith this background in mind." The Court first stated that the situation called for a weighing of federal and state interests, clearly based on the state's interest in the area and the holding that the Waterfront Commission Act did not, in truth, "deprive" the employees of their ability to choose a labor representative.

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12. No compact is possible because New York, like the other states abutting New Jersey, has not legalized casino gambling. If anything, the lack of an interstate compact shows that the problem here is more deeply rooted in local concerns than that in *DeVeau*, where the problem was an interstate one and thus more susceptible to federal regulation.

The Court then stated the crucial issue:

> The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in [the New York Act].

Id. at 153. The Court then answered its question:

> In light of the purpose, scope, and background of this New York legislation and Congress' relation to it, such an inference of incompatibility has no foundation. *Id.*

In other words, the Court had *two* grounds for its decision; one was the nature of the statute itself, and the other was the Congressional approval. Again, in distinguishing *Hill v. Florida*, the Court cited the same two factors: Congressional approval, and

> that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infesting a particular industry.

Id. at 155.

There is much more to *DeVeau* than a rubber-stamp on a Congressionally-approved state statute. The Court *first* held that the impact of the state legislation was so minimal that a balancing of interests was appropriate; it *then* looked both to Congressional intent—including Congress' implied assent in approving the compact—and to the "purpose, scope and background" of the state legislation to determine that the legislation was not pre-empted.

This Court placed Congress' ratification of the *DeVeau* compact in the context of balancing state versus federal interests; it was not impelled to develop a balancing test because of the presence of the compact. In other words,

the need for a realistic accommodation of interests was present in spite of the compact; the compact approval was a subordinate question to be placed on the balancing scales. The Third Circuit's opinion thus cannot be defended on the theory that there is no need for a weighing of interests absent prior Congressional approval.

4. The Third Circuit Failed to Follow the Pre-emption Analysis Announced in DeVeau

The pre-emption test announced by the Third Circuit below is directly at odds with the test announced by this Court in *DeVeau*. The Circuit held as follows:

> We note at this point that there are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute.
>
> > When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.
>
> On the other hand, where the activity in question is not specifically protected by section 7 but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. The *Hill v. Florida* rule, *and this case, fall in the first category.* Choice of a bargaining representative is totally protected by sec-

> tion 7, except to the extent that the bargaining representative may be disqualified under section 503(a) of the LMRDA. No section 504 LMRDA disqualification applies to this Union's officers. *Thus there is neither occasion nor justfication for engaging in weighing or balancing.*

709 F.2d at 828 (emphasis added; citations omitted).

The Circuit Court's analysis blatantly misconstrues this Court's holding concerning a nearly identical state statute. In *DeVeau*, this Court held that:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received 'good conduct' certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. Obviously the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.'

363 U.S. at 152.

The *DeVeau* Court then did exactly what the Third Circuit saw neither "occasion nor justification" to do, to wit: balancing the impact of the state legislation

on Section 7 rights against a "legitimate and compelling" state interest in "combating local crime in a particular industry."

The Circuit's failure to apply the proper test to these facts constitutes, in and of itself, grounds for reversal and remand.

POINT FOUR

NLRB PROCEDURES ARE INADEQUATE TO SAFEGUARD THE CITIZENS' INTERESTS

The underlying premise of this litigation is the inadequacy of NLRB procedures to prevent criminal infiltration in an industry that, like the gaming industry, is highly attractive to organized crime. This inadequacy has often been recognized. Congress has recognized it at least three times: in passing the LMRDA, in approving the compact in the New York Waterfront Commission case and in enacting RICO. New Jersey has recognized it in passing the Casino Control Act. And this Court recognized it in *DeVeau v. Braisted, supra.* In some situations, NLRB procedures may be worse than inadequate; they may be, as a practical matter, non-existent.

The reality of the current situation in Atlantic City is that, without the New Jersey Casino Control Act, the state has no satisfactory way to prevent criminal syndicates from gaining a foothold in the gaming industry through infiltration of labor unions. The NLRB simply will not review the type of activity regulated by the Casino Control Act.

The NLRB can refuse to certify a labor union if someone can prove, to the Board's satisfaction, that the union is so corrupt that it is not really a "labor organization"—that is, if a union is a profit-making enterprise for its officers to a degree that it would not adequately repre-

sent its members' interests. This procedure is generally inadequate for at least two reasons.

First, there is no satisfactory way for the state to attack a labor organization before the Board. Appellee Local 54's representation of employees in the gaming industry in Atlantic City has to date, in every instance, resulted from voluntary recognition. Local 54 has never been certified by the Board as the exclusive bargaining representative of any employee in any Atlantic City casino hotel. (The Third Circuit's constant reference to Local 54 as the "certified" bargaining representative of the employees in question—*e.g.*, 709 F.2d at 817, 825, 830, 831 and 832—is incorrect.) Thus no opportunity presently exists for the Board to revoke certification, since none exists.

Moreover, the "new hotel" clause in the recently negotiated agreement between Local 54 and each of the current Atlantic City casino hotels raises the possibility that Local 54 may never have to go through the Board's Section 9 petition, election and certification procedures to represent employees of the Atlantic City gaming industry. The "new hotel" clause requires the hotel casinos to recognize this union when presented with appropriate evidence of majority status without invoking the type of formal procedures where the status of a labor organization could be examined.

This Court has previously recognized that the ability of an interested person to find a satisfactory forum to protect its interests may provide strong impetus to abridge even the primary jurisdiction of the NLRB. In *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), this Court held that the primary-jurisdiction rationale

> does not extend to cases in which an employer has no acceptable method of invoking, or inducing the union to invoke, the jurisdiction of the Board.

Id. at 202.

More importantly, however, even if the state could invoke a Section 2(5) certification hearing, which it cannot, there are critical differences between the issues that the Board would consider and the problems that the state must resolve. Because of the insidious and persistent nature of mob infiltration, the state believes it cannot safely allow convicted felons and associates of known career criminals to control certain labor unions. It is interested in one and only one issue: Are a labor organization's officers so tied to organized crime that their control of a labor organization creates an unsatisfactory risk of mob control?

The Board, on the other hand, is interested in an entirely different question: Does the union seek to represent employees? It is entirely conceivable that a corrupt union owned and run by a Cosa Nostra family could pass the Board's test. As the Board itself has stated,

> In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. If an organization fulfills these two requirements, the fact that it is an ineffectual representative, that its contract does not secure the same gains that other employees in the area enjoy, that *certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused*, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

Alto Plastics, 136 N.L.R.B. 850, 851-52 (1962) (emphasis added).

Sears, Roebuck, supra, considered this problem of Board inquiries being substantively inadequate to protect other legitimate interests, and held that

> [t]he critical inquiry . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. . . .
>
> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court.

436 U.S. at 197-98.

The overlap between the Casino Control Act and the NLRA is extremely small, a fact which is important in two ways. A legitimate state interest is not protected by the NLRA; and the impact on the Board's processes is minor. The reasons for pre-empting the state statute are less important than the reasons for allowing it to operate, and this Court should allow the Casino Control Act to stand.

POINT FIVE

THE PENSION AND WELFARE FUND SANCTION HAS NEVER BEEN USED AND CONSIDERATION OF ITS PRE-EMPTION BY ERISA IS PREMATURE

Section 93(b)'s prohibition against a labor organization's administration of "any pension or welfare funds, if any officer . . . is disqualified in accordance with . . . Section 86 of [the] Act" might be pre-empted by ERISA if it were applied by the state to ERISA-covered benefit plans. However, this specific provision of the state statute

has *not* been applied or enforced. In *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), the Court noted that states,

> when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them.

Id. at 470. The Court, therefore, held:

> In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow.

Id. at 470-471.

There are pension and welfare funds that are not subject to ERISA, and the state courts might well construe the statute to apply only to such non-ERISA funds. If so, they would certainly not be subject to federal preemption.

It is simply too soon for the federal courts to adjudicate this part of the New Jersey Casino Control Act, both in terms of ripeness and in terms of a live case or controversy. The lower court's decision is premature and should be reversed.

CONCLUSION

For all of the reasons set forth above, the Third Circuit erred in holding that New Jersey's application of the provisions of its Casino Control Act to the Appellees violated the doctrine of federal labor law pre-emption. The Third Circuit's decision, to the extent it is based on faulty pre-emption analysis, should be vacated, and an opinion should be entered by this Court upholding the New Jersey statute as applied in this case against attack on federal labor law pre-emption grounds.

Respectfully submitted,

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PROOF OF SERVICE

It is hereby certified that three (3) copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS have been served this 11th day of January, 1984, by United States mail, postage prepaid, upon the following counsel of record:

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No. 83-573-AFX
Status: GRANTED

Title: Martin Danziger, etc., et al., Appellants
v.
Hotel and Restaurant Employees and Bartenders International Union Local 54, et al.

Docketed:
September 26, 1983

Court: United States Court of Appeals for the Third Circuit

Vide:
83-498

Counsel for appellant: Genatt, Robert J.

Counsel for appellee: Katz, Bernard N.

Entry	Date	Note	Proceedings and Orders
1	Sep 26 1983	G	Statement as to jurisdiction filed.
2	Oct 28 1983		Joint supplement to Jurisdictional Statement filed. VIDED
3	Nov 2 1983		DISTRIBUTED. November 23, 1983
4	Oct 29 1983		Brief of appellees Hotel & Restaurant, et al. in opposition filed. VIDED.
5	Nov 28 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 83-498, and a total of one hour is allotted for oral argument.
			**********
6	Jan 12 1984	G	Motion of Atlantic City Casino Hotel Association, et al. for leave to file a brief as amici curiae in No. 83-573 filed.
7	Jan 12 1984		Brief of appellants Martin Danziger, et al. filed.
8	Jan 12 1984		Joint appendix filed. VIDED.
10	Jan 12 1984	G	Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae filed.
11	Jan 23 1984		Motion of Atlantic City Casino Hotel Association, et al. for leave to file a brief as amici curiae in No. 83-573 GRANTED.
12	Jan 31 1984		Record filed.
14	Feb 1 1984		Order extending time to file brief of appellee on the merits until February 21, 1984.
15	Feb 10 1984		Record filed.
16	Feb 10 1984		Certified copy of partial proceedings and appendices received.
17	Feb 14 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (3rd case) This case is consolidated with No. 83-498. (1 hour)
18	Feb 21 1984		Motion of National Right to Work Legal Defense Foundation for leave to file a brief as amicus curiae GRANTED.
19	Feb 21 1984	*	Brief of appellees Hotel & Restaurant, et al. filed. VIDED. (with separate appendix)
20	Feb 21 1984	G	Motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for leave to file a brief as amicus curiae filed.
21	Feb 27 1984		CIRCULATED.
22	Mar 5 1984		Motion of International Brotherhood of Teamsters,

No. 83-573-AFX

Entry	Date	Note	Proceedings and Orders
			Chauffeurs, Warehousemen and Helpers of America for leave to file a brief as amicus curiae GRANTED. Justice Marshall OUT.
23	Mar 19 1984	X	Reply brief of appellants Martin Danziger, et al. filed.
24	Mar 26 1984		ARGUED.